A detailed legal analysis which explains why the case of *For Women Scotland* was wrongly decided by the UK Supreme Court

Introduction

The UKSC judgment in the case of *For Women Scotland* (hereafter "*FWS*") has caused strong reactions across the UK, not least of all amongst legal commentators; but few detailed analyses of the premises underpinning the judgment have been published for a general audience. This article undertakes that detailed analysis of the *FWS* judgment.

In the UK Supreme Court (UKSC) judgment in *For Women Scotland*,(hereafter "*FWS*") at paragraph 265, the Supreme Court set out a summary of their reasoning, and these premises formed the justification for their conclusions. In this article, we will be examining each of those premises in turn. These will be bolded and cited as "Premise 1, Premise 2 etc" to make clear that they are quotes from the judgment itself.

We will examine each premise in turn in order to establish whether the judgment is factually correct, well-reasoned and whether the conclusion logically flows from the premises. This will be done in order to establish whether or not the UKSC judgment in *FWS* is a justifiable interpretation of the Equality Act and whether it is well reasoned and based on relevant facts and law.

Background to the case

This case was bought by For Women Scotland, who sought to judicially review the statutory guidance which the Scottish Ministers promulgated under section 7 of the Gender Representation on Public Boards (Scotland) Act 2018 ("the 2018 Act"), in May/June 2020.

According to a news story published on the For Women Scotland website on the 31st July 2020:

> "A pre-action protocol letter has been sent to the government by lawyers acting on behalf of For Women Scotland expressing significant concerns that a law intended to address historical under-representation of women on public boards is fundamentally flawed and that the Scottish Government has exceeded its authority in redefining "woman". This follows the publication of Statutory Guidance on 29 May 2020.

Therefore, the trigger for the case (what lawyers call the 'cause of action') in the case of *FWS*, started with the publication of the Statutory Guidance in late May/June 2020, which was in the middle of the transition period. EU law carried on applying to the UK throughout 2020, as a direct result of Article 127(1) and (3) of the **EU-UK Withdrawal Agreement**. The **EU-UK Withdrawal**

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Agreement also specified how the courts were supposed to interpret cases covered by EU law during the transition period.[1]

Procedural history of the case of For Women Scotland

The procedural history is:

October 23 2020 – For Women Scotland set up their Crowdjustice page and asked their supporters to share it far and wide.

26th November 2020 - A procedural hearing was held at the (Outer House) of the Court of Session to make sure all legal documents were lodged correctly and to schedule additional court time for the substantive hearing to run over two days on 7th and 8th January. Equality Network applied to intervene.

11 December 2020- A hearing was held on the 11th December 2020 to determine whether Equality Network should be allowed to intervene in the case. Lady Wise allowed intervention of a written submission of no more than 5,000 words by 18th December.

31 December 2020 – the transition period ends, and the UK leaves the EU. During the transition period, EU law carries on applying under Articles 4, 5, 126, and 127(1) and (3) of the EU-UK Withdrawal Agreement.

Post Brexit procedural history

7th and 8th January 2021 - the substantive hearing took place before Lady Wise, in the Outer House of the Court of Session.

23 March 2021 - judgment was issued by Lady Wise in favour of the Scottish government. The judgment is available here. This includes extensive references to EU law, the Equal Treatment Directives and relevant CJEU case law, all of which are directly relevant to the question of whether sex in law relates to biological sex or certificated sex.

3rd and 4th November 2021 – There was a substantive hearing date at the Second Division, Inner House, Court of Session

22 March 2022 - *FWS* win their appeal (For Women Scotland Ltd v The Lord Advocate [2022] CSIH 4, 2022 SC 150 "*FWS1*"). On 22 March 2022 the Second Division declared that the definition of "woman" in section 2 of the 2018 Act was outside the legislative competence of the Scottish Parliament, because the definition of "woman" in section 2 of the 2018 Act included trans women as defined, it went beyond the scope of the exception permitted by section L2 of Schedule 5 to

[1] See, for example, Article 4(1), 4(2), 4(3), 4(4) and Article 5 of the EU-UK Withdrawal Agreement

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the Scotland Act; it therefore purported to legislate in respect of a reserved matter, namely equal opportunities, and so was outside the competence of the Scottish Parliament.

19 April 2022 Following on from that decision the Scottish Ministers produced revised statutory guidance to the 2018 Act.

That revised guidance, the organisation For Women Scotland contended, did not conform to the interlocutors of 18 February and 22 March 2022 pronounced by the Appeal Court in the earlier petition and was therefore unlawful. Therefore, it too ought to be reduced as had happened in *FWS1.* For Women Scotland therefore appealed to the Outer House of the Court of Session, to get the revised statutory guidance overturned.

13th December 2022 The Outer House, Court of Session issued its ruling. Lady Haldane heard the appellant's challenge in the Outer House. In a carefully reasoned judgment dated 13 December 2022 ([2022] CSOH 90; 2023 SC 61), she dismissed the petition. She rejected the appellant's argument that the Inner House's decision in the first judicial review had authoritatively determined that "sex" in the Equality Act was confined to biological sex only (para 44). She held that section 9(1) of the GRA 2004 had the effect that a Gender Recognition Certificate (hereafter "GRC" changed a person's sex for all purposes, stating that the language of section 9 of the GRA 2004 "*could scarcely be clearer*" (para 45). She rejected the appellant's submission that the GRA 2004 had a narrow purpose which had been largely superseded by subsequent legislation, including legislation establishing the legality of same sex marriage. She observed that the GRA 2004 listed exceptions to the rule in section 9(1), such as marriage, parenthood, succession, peerages and trusts, and stated that the founding principle of section 9 of the GRA 2004 is a broad one: "*that the acquired gender becomes the person's sex 'for all purposes*' subject to any other enactments, or the statutory exceptions listed" (para 47). Lady Haldane rejected the submissions:

(i) that there was a conflict between the GRA 2004 and the Equality Act 2010, which she stated was "drafted in full awareness of the 2004 Act, and its ambit" (para 50), and

(ii) that the Equality Act 2010 impliedly repealed or disapplied section 9(1) of the GRA 2004 (para 52). As a result, "sex" in the Equality Act was not confined to biological sex but includes the acquired sex of those who possess a GRC obtained under the GRA 2004. Lady Haldane therefore concluded that the revised guidance of the Scottish Ministers on the 2018 Act was lawful.

1 November 2023 - The Second Division of the Inner House (the Lord Justice Clerk (Lady Dorrian), Lord Malcolm and Lord Pentland) agreeing with Lady Haldane, held that the GRA 2004 was a far-reaching enactment which created a mechanism by which a person could change his

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or her sex in the eyes of the law. The judgment (para 42) stated that section 9(1), (2) and (3) of the GRA 2004 read together meant that a person with a GRC "acquires the opposite gender for all purposes unless there is a specific exception in the GRA [2004]; or unless the terms and context of a subsequent enactment require a different interpretation to follow".

The Second Division concluded that the Guidance on the 2018 Act was lawful because a person with a GRC in the female gender is a "woman" for the purposes of section 11 of the Equality Act 2010.[2]

The case was then appealed to the UK Supreme Court. The case was heard on the 26th and 27th November 2024. The Supreme Court issued its judgment in that case on the 16th April 2025.

The central issue on this appeal was whether references in the Equality Act to a person's "sex" and to "woman" and "female" are to be interpreted in the light of section 9 of the Gender Recognition Act (GRA) as including persons who have an acquired gender through the possession of a Gender Recognition Certificate (GRC).

Having set out what prompted the UKSC case, we can now consider the main premises that the UKSC raised in its judgment, to justify the conclusions it came to, and examine whether these conclusions are factually, legally and procedurally justified.

[2] It is worth pointing out that the European Commission's European Network of Legal experts in Gender Equality and Non-discrimination publishes yearly UK country reports on whether EU Equal Treatment and discrimination law is being complied with in the UK post Brexit. The 2024 UK Country report said that "the EqA is silent on whether sex includes legal sex. The EHRC believes that it does, and this appeared to be confirmed by the Inner House of the Court of Session in *For Women Scotland v The Scottish Ministers* [2023] CSIH 37…The 2024 report concluded that "In the author's view the majority of the legislation complies with EU law (apart from the pregnancy discrimination provisions in Northern Ireland). This suggests that as far as the European Network of Legal Experts are concerned, the decision in the Inner House in November 2023 was correct as a matter of EU law.

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The Supreme Court concluded, on the basis of the above premises that:	*"We therefore conclude that the provisions of the EA 2010 which we have discussed are provisions to which section 9(3) of the GRA 2004 applies. The meaning of the terms "sex", "man" and "woman" in the EA 2010 is biological and not certificated sex. Any other interpretation would render the EA 2010 incoherent and impracticable to operate (para 264)."*	

We conclude our paper with a discussion on whether this conclusion is justified on the application of the relevant facts relating to the background to the Equality Act, relevant EU law and CJEU caselaw, or whether the case of *FWS* was wrongly decided by the Supreme Court.

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Analysis of the Supreme Court judgment in the case of *For Women Scotland*[3]

In this section, we will be analysing all of the premises cited in the judgment at paragraph 265, in order to assess whether they are factually, legally and procedurally sound, or not, starting with the first premise and then working through the rest sequentially.

1) **First premise: The question for the court is a question of statutory interpretation; we are concerned with the meaning of the provisions of the EA 2010 in the light of section 9 of the Gender Recognition Act 2004 (GRA 2004) (para 2 of the judgment in *FWS*).**

In essence, this is correct. The question for the UKSC is a question of statutory interpretation; they are concerned with the meaning of the provisions of the Equality Act 2010, in the light of section 9 of the GRA 2004.

Between paragraph 8-30 of the *FWS* judgment the UKSC lays out the principles of statutory interpretation that they intend to apply. The method they are using is the common law or global method of construction, where external aids to interpretation play a secondary role. Therefore, the Supreme Court does not appear to have considered any of the background documents to the Equality Act 2010.

However, given that the provisions relating to gender discrimination and sex discrimination found in the Equality Act are derived from EU law, not UK law, we would argue that the UK Supreme Court has used the wrong method of statutory interpretation. The Equality Act provisions relating to sex discrimination, gender reassignment, pregnancy and maternity, were introduced to give effect to the **Gender Directive** (Directive 2004/113) and the **Recast Equal Treatment Directive** (Directive 2006/54), as we will go on and demonstrate in detail below. Therefore, the UK Supreme Court should have interpreted the Equality Act using a conforming interpretation and applying the purposive approach instead.

One interesting question is what law applies when a case is started during the transition period, but the Supreme Court only hears the case in 2024, and gives its ruling in 2025, as in the case of FWS? Is it the law applicable in 2024 that applies or the law that was in force when the case started? According to the case of ***Lipton v BA City Flyer Ltd*** [2024] UKSC 24, Lady Simmler said:

> *"it is the law in place at the time the material events occur which applies, rather than some different version introduced at a later date."*[4]

So, the Supreme Court should have applied the law that was applicable during the transition period to the case of *FWS* ie EU law. The fact that the case started during the transition period when EU still applied, is

[3] The author would like to thank the reviewers, Professor Steve Peers and Dr Sylvia de Mars for their constructive comments and suggestions, which helped improve the quality of this paper.

[4] *Lipton v BA City Flyer Ltd* [2024] UKSC 24 paragraph 66

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even more reason for the Supreme Court to adopt a conforming interpretation in the case of *FWS*. The Supreme Court should have used a purposive approach in the case of *FWS*, not the common law system of construction that they did use.

One of the leading texts on statutory interpretation - *Bennion, Bailey and Norbury on Statutory Interpretation* – covers in Part 9 how UK courts are supposed to interpret EU law. This specifies that whilst we were members of the EU and during the transition period, courts were under an obligation 'to interpret all domestic legislation, if at all possible, so as to comply with EU law.[5] This principle – called the **'Marleasing principle'** – after the case that established this principle, applies even if the EU legislation does not have direct effect. The courts are required to deliver a 'conforming interpretation' when interpreting a case based on EU law.

The principles to be applied by the courts when interpreting EU law were set out in the case of ***Vodafone 2 v Revenue and Customs Commissioners*** [2008][6], where it was held at paragraph 70, that from the authorities cited in that case the following guidance was derived:

> *i) A "Conforming construction" of UK legislation, under the Marleasing principle in an appropriate case, can extend as far as implying words or provisions into UK legislation even where the relevant provisions of that legislation are unambiguous.*
>
> *ii) In implying words or provisions, it is not necessary for the court to produce precise wording as if redrafting the legislation but the words, or the sense of them, must not run counter to the overall purpose and pattern of the provisions being construed ("the grain" of that legislation).*
>
> *iii) The duty of UK courts to interpret UK legislation in conformity with EC law "where possible" does not permit those courts, in the process, to amend UK legislation. The furthest limit of what it is permissible for UK courts to do is drawn at the point where interpretation becomes legislation.*
>
> *iv) UK courts should not imply words into UK legislation under the principle of conforming construction as in i) above where to do so involves the court in taking policy decisions which a court is unfitted to take. Typically, this situation will arise where there are two or more choices as to the form of words to be implied, each of which may render the legislation Community law compliant, but which produce differing effects on the parties or on the public generally.*
>
> *v) The duty to construe UK legislation, in accordance with the principle of conforming construction, applies, with particular strength, where the legislation in question was enacted to implement provisions of Community law, usually a Directive. This is a logical conclusion because the UK court in such cases will have guidance as to the purpose which that legislation was designed to achieve from the Directive itself. In those cases, lacunae in the UK legislation can properly be filled by implying words into legislative provisions of which the meaning is otherwise plain, where such implication is necessary to give effect to the plain intention of the Community law in question. It is easier to see what "goes with*

[5] See *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135.

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the grain" of the UK legislation where the court has a Directive for guidance.

vi) When implying words or provisions… particular regard must be had to the Community law principle of certainty.

Bennion, Bailey and Norbury on Statutory Interpretation concluded that the principles to be applied by the courts when interpreting EU law were set out in the case of ***Vodafone 2 v Revenue and Customs Commissioners*** [2008][7], and that:

"In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:

(a) it is not constrained by conventional rules of construction.

(b) it does not require ambiguity in the legislative language.

(c) it is not an exercise in semantics or linguistics.

(d) it permits departure from the strict and literal application of the words which the legislature has elected to use.

(e) it permits the implication of words necessary to comply with EU law obligations, and

(f) the precise form of the words to be implied does not matter."

Historically, UK courts have used the purposive approach when deciding how to interpret legislation that implements EU law, which involves looking at the EU laws that were enacted into the relevant UK law, examining CJEU caselaw, and reaching a decision that is in conformity with the purpose of the EU law. We will be applying this approach in relation to the decision in *FWS* and therefore doing what the Supreme Court should have done when interpreting the Equality Act and s9 of the Gender Recognition Act 2004.

If the purposive approach had been used in the case of *FWS* by the Supreme Court then a different decision must have been reached, as under EU law a certificated sex reading of the Equality Act 2010 in light of section 9 of the GRA 2004 would have been the only possible outcome, as we will go on to show.

[7] *Vodafone 2 v Revenue and Customs Commissioners* [2008] EWHC 1569 (Ch)

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2) **Second premise: Parliament in using the words "man" and "woman" in the SDA 1975 referred to biological sex (paras 36-51 in the judgment).**

Background to the Equality Act

This is true, but actually irrelevant, because the provisions of the Equality Act that covered sex discrimination and gender reassignment in the Equality Act 2010 were actually introduced to give effect to two EU directives, the **Gender Directive** (Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services) and the **Recast Equal Treatment Directive** (European Parliament and Council Directive 2006/54/EC (as recast) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation).

The historical background to the Equality Act 2010 is that the provisions of the Sex Discrimination Act 1975, which defined sex using the terms "man" and "woman" was amended to give effect to the **Gender Directive.** The **Gender Directive** applies the following gender-neutral definitions of sex in the directive; they do not refer to men and women at all. Article 2 defines various types of sex discrimination as:

> *a) direct discrimination: where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation.*
> *(b) indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*
> *(c) harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*
> *(d) sexual harassment: where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.*

The Labour Government of the day published several key documents relating to the Equality Bill. In June 2007 the Department for Communities and Local Government published a consultation paper, **Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain**. This was followed in June and July 2008 by two Command Papers published by the Government Equalities Office: **Framework for a Fairer Future – the Equality Bill** (Cm 7431); and **The Equality Bill – Government Response to the Consultation** (Cm 7454). **Explanatory notes to the Equality Bill** were also produced.[8]

[8] These documents are crucial if someone wishes to understand the background to the Equality Act 2010.

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The **Discrimination Law Review,** at page 147, confirms that, as a result of the **Gender Directive,** interpreted in accordance with the certificated sex approach taken by the CJEU in the case of C- 13/94 ***P v S and Cornwall County Council*** [1996] 2 C.M.L.R. 247, the UK government was required to outlaw discrimination against people who were trans, in the provision of goods and services which fall within the Directives scope, when drafting the Equality Bill. It confirms that:

> *"10.7 European Directive 2004/113/EC ('the Gender Directive') requires equal treatment between men and women in the access to and supply of goods and services. The Directive does not explicitly mention gender reassignment. However, the European Court of Justice[9] has ruled that the* ***right not to be discriminated against on grounds of sex includes discrimination arising from a person's gender reassignment. Therefore, we are required to outlaw discrimination against transsexual people in the provision of goods and services which fall within the Directive's scope.*** [Bolded for emphasis]

One of these command papers, called the **"Equality Bill – Government response to the consultation**" confirmed that the Sex Discrimination Act 1975 was amended by the **Gender Directive**, and as we shall go on to see replaced the terms "men" and "women" found in the Sex Discrimination Act in line with the gender-neutral definition of sex found in the **Gender Directive.** It said:

> *"The European Gender Directive required Member States to implement it by 21 December 2007. We notified the European Commission in advance of the deadline that there would be a short delay in implementing the Directive in the United Kingdom. Implementation was achieved through the Sex Discrimination (Amendment of Legislation) Regulations 2008 which came into force on 6 April 2008. These Regulations amended both the Sex Discrimination Act 1975 and the Sex Discrimination (Northern Ireland) Order 1976.[10]*

This was done to ensure that the UK Government implemented the **Gender Directive** as close to the deadline for implementation as possible. The intention was to incorporate the provisions of the **Gender Directive** into the Equality Act, but the Government were aware that the Equality Act would not become law by the 21 December 2007. Therefore, the Sex Discrimination Act 1975 was **amended by the Sex Discrimination (Amendment of Legislation) Regulations 2008**[11], and then when the Equality Act 2010 became law, the Sex Discrimination (Amendment of Legislation) Regulations 2008 were repealed in their entirety, by **Part 2 of Schedule 27 of the Equality Act 2010.** Once the Equality Act became law the Sex Discrimination Act 1975 was then repealed, under **Part 1 of Schedule 27** of the Equality Act 2010. The Sex Discrimination Act 1975 hasn't been law since 2010.

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[9] In the case of *P v S and Cornwall County Council* (Case 13/94) [1996] 2 C.M.L.R. 247
[10] P188 of the Command Paper CM 7454 "**The Equality Bill – Government Response to the Consultation**".
[11] **Sex Discrimination (Amendment of Legislation) Regulations 2008** (S.I. 2008/963)
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The case of ***R. (on the application of Z) v Hackney LBC*** [2020] UKSC 40, which was decided by the UK Supreme Court in 2020, confirms that the above understanding of the legislative background is correct. This case concerned the application of various Equal Treatment directives, including the **Gender Directive** and the Race Directive, and whether a charity could rely on the positive action provisions to justify helping people with one protected characteristic, whilst not helping others with different protected characteristics. At paragraph 99 of the judgment in the case of ***R. (on the application of Z) v Hackney LBC***, the Supreme Court said:

> *"The Sex Discrimination Act 1975 made forms of discrimination on grounds of sex unlawful. In 2008, section 43 of the 1975 Act was amended by the Sex Discrimination (Amendment of Legislation) Regulations 2008 (SI 2008/963) by the addition of subsection (2A), which provided that subsection (1) should not apply to specified types of discrimination "unless the conferral of benefits is - (a) a proportionate means of achieving a legitimate aim, or (b) for the purpose of preventing or compensating for a disadvantage linked to sex".*
>
> *This was the forerunner of what became section 193(2) of the 2010 Act.* ***The Explanatory Memorandum for the Regulations*** *stated that this provision was introduced to give effect in domestic law to Council Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services ("the Gender Directive"). The amendment was introduced while consultation on the terms of what became the 2010 Act was in progress."*
>
> Paragraph 100 of the **judgment** in this case went on to quote Recital (16) and Article 6 of the **Gender Directive.** The Supreme Court then went on to demonstrate their detailed knowledge of the background to the Equality Act at paragraph 101 where they said that:
>
> > *"While the 2010 Act was a Bill, Parliament's Joint Committee on Human Rights sent a letter to the Government dated 2 June 2009 raising a number of queries about the Bill, including about the clause which became section 193. The Government's response by letter dated 19 June 2009 explained that the exemptions from anti-discrimination law for charities were to be tightened up in the new provision in line with the model already adopted in relation to sex discrimination, so that it would no longer be sufficient for them to discriminate if their charitable instrument allowed for this; now "a charity would also need to show that it was justified in discriminating".*
> >
> > *This would be achieved if it could show that such discrimination "is objectively justified" (ie under section 193(2)(a) or is "intended to prevent or compensate for disadvantage linked to the protected characteristic in question" (ie under section 193(2)(b)). It is clear from this that in proposing the provision in section 193(2) the government intended sub-paragraphs (a) and*

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(b) to serve as distinct conditions for the operation of the charitable exemption and that it considered that satisfaction of either of them would constitute justification for discrimination which would meet the requirements of EU law under the Race Directive and the Gender Directive.

Given that the Sex Discrimination Act 1975, was amended by the **Sex Discrimination (Amendment of Legislation) Regulations 2008** in order to give effect to the **Gender Directive**, and these changes were then incorporated into the Equality Act, the Supreme Court should have interpreted the Equality Act in light of the **Gender Directive** not the Sex Discrimination Act 1975, as the **Gender Directive** amended the Sex Discrimination Act as part of the process of enacting the Equality Act 2010.

The language of the Equality Act, specifically the definition of sex, is not derived from the Sex Discrimination Act – it is derived from the **Gender Directive**.

What is the Gender Directive and what does it do?

The purpose of this Directive is '*to lay down a framework for combating discrimination based on sex in access to goods and services, with a view to putting into effect the principle of equal treatment between men and women'*. The Directive represents a significant development in the history of EU equality law: not only does it add an important measure to the existing canon, but it is also the first instrument that expands the concept of sex equality beyond the realm of employment and professional life. Indeed, the idea behind this instrument was that, in order to be effective, the principle of gender equality could not be limited to employment but needed to be applied to all aspects of everyday life. Therefore, the **Gender Directive** applies to discrimination experienced by people of one sex or the other outside of a work context.

The directive applies to goods and services offered to the public, regardless of the personal circumstances of the service recipient, and which are offered outside of the private and family spheres. However, it doesn't apply to media or advertising content or to education.

The **Gender Directive** bans discrimination in the field of goods and services. It prohibits:

- any less favourable treatment of men or women by reason of their gender.
- any less favourable treatment of women due to pregnancy or maternity.
- harassment,
- sexual harassment or
- any incitement to discriminate with regard to the offer or supply of goods or services.

Differential treatment can only be accepted if it is justified by a legitimate aim and any limitation must be appropriate and necessary.

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Article 4 of the **Gender Directive** defines what is meant by Equal Treatment. It says:

> *"1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that*
>
> *(a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity.*
>
> *(b) there shall be no indirect discrimination based on sex.*
>
> *2. This Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.*
>
> *3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.*
>
> *4. Instruction to direct or indirect discrimination on the grounds of sex shall be deemed to be discrimination within the meaning of this Directive.*
>
> *5. This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."*

The relevance of the Gender Directive to the Equality Act provisions relating to sex and gender.

This can be seen by looking at the background documents to the Equality Act. In June 2007 the Government commissioned a Discrimination Law Review, with a view to creating a Single Equality Act, because the whole area of discrimination law was getting very complicated. This review led to the publication of a 190-page document called "**The Discrimination Law Review – A framework for fairness; Proposals for a Single Equality Bill for Great Britain**" (hereafter "Discrimination Law Review/DLR) which outlined the governments thinking in relation to creating a Single Equality Act. This is a crucial document if someone wishes to understand the background to the Equality Act.

However, because the UKSC decided to interpret the Equality Act using the common law method of interpretation as opposed to the purposive method usually applied to EU law implemented in the UK, they excluded documents like the Discrimination Law Review. As a result, the UKSC's understanding of the background to the Equality Act in the case of *FWS*, is based on fundamental and arguably fatal errors of fact.

The **Discrimination Law Review**, at page 147, confirms that, as a result of the **Gender Directive**, the government was required to outlaw discrimination against people who were trans, in the provision of goods and services which fall within the Directives scope. It confirms:

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Gender Directive

> *"10.7 European Directive 2004/113/EC ('the Gender Directive') requires equal treatment between men and women in the access to and supply of goods and services. The Directive does not explicitly mention gender reassignment. However, the European Court of Justice*[12] *has ruled that the* ***right not to be discriminated against on grounds of sex includes discrimination arising from a person's gender reassignment. Therefore, we are required to outlaw discrimination against transsexual people in the provision of goods and services which fall within the Directive's scope.*** [Bolded for emphasis]

There is therefore no doubt that the provisions of the Equality Act that relate to gender reassignment and sex discrimination are giving effect to EU law and CJEU caselaw. People who are trans have those rights because the European Court of Justice has held since 1966 that discrimination on the grounds of gender reassignment is discrimination on the grounds of sex and these rights were incorporated into the Equality Act 2010 to give effect to EU law.

The **Discrimination Law Review** went on to say:

> *10.8 The deadline for implementing the Gender Directive is 21 December 2007. The proposed Single Equality Bill will not come into force until after this date, so we intend to transpose the Gender Directive using regulations under the European Communities Act 1972. Our approach to implementation is to make the amendments necessary to fulfil our obligations under the Gender Directive. The implementing regulations will amend the Sex Discrimination Act 1975 in order to outlaw direct discrimination in goods, facilities and services on grounds of gender reassignment.*
>
> *10.9 Our proposals for implementing the Gender Directive are set out in more detail in* ***Annex B.***

Therefore, the provisions relating to sex discrimination, pregnancy and maternity and gender reassignment in the Equality Act 2010, gave effect to the provisions of the Gender Directive (**Directive 2004/113**) taken together with the case of ***P v S and Cornwall County Council*** [1996][13].

The **Discrimination Law Review**, at page 148, went on to say that:

> ***Our proposals for the Single Equality Bill***

[12] In the case of *P v S and Cornwall County Council* (Case 13/94) [1996] 2 C.M.L.R. 247
[13] *P v S and Cornwall County Council* (Case 13/94) [1996] 2 C.M.L.R. 247

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10.10 Domestic legislation currently does not protect transsexual people from indirect discrimination. We propose to introduce protection for transsexual people against indirect discrimination through the Single Equality Bill. This would apply to all areas in which discrimination on grounds of gender reassignment is unlawful. Our proposals for this are set out in more detail in Chapter 1. This will provide transsexual people with the same protection from discrimination in the provision of goods, facilities and services as is afforded on grounds of sex, race, disability, religion or belief and sexual orientation.

10.11 In addition, the scope of the Gender Directive means that the implementing regulations will not protect transsexual people from discrimination by public authorities in the exercise of their public functions. Generally speaking, public functions are those which only a public authority can carry out, such as setting national or local government policy or allocating public funds (see chapter 2). Extending protection to public functions would ensure that discrimination is unlawful across the full range of activities carried out by public authorities. It would be necessary to do this if we were to ensure that a single public sector duty (see chapter 5) would apply to transsexual people in the same way as to other protected groups. We therefore propose to outlaw discrimination on grounds of gender reassignment in the exercise of public functions."

If the Equality Act gave effect to the Recast Equal Treatment Directive and the Gender Directive, what do those directives say in relation to gender reassignment and sex?

Recital 3 of the **Recast Equal Treatment Directive** states that:

"The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person."

So, as far as the **Recast Equal Treatment Directive** is concerned, people are either one sex or the other, but discrimination on the grounds of gender reassignment is discrimination on the grounds of sex. Therefore, sex, as a matter of EU law, applies a certificated sex reading to the term sex, not a biological reading.

The Gender Directive (Directive 2004/113) Recital (16) says:

"Differences in treatment may be accepted only if they are justified by a legitimate aim. A legitimate aim may, for example, be the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association

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(in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events). ***Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities."*** [Bolded for emphasis]

The key points here are:

(i) that under the Directive, treating people who are trans differently can only be justified by a legitimate aim and

(ii) This requirement flows from EU law, specifically the **Gender Directive**

(iii) Any limitation has to be shown to be appropriate and necessary **and in accordance with the criteria derived from CJEU caselaw.** This means that any attempt to ban trans people from spaces can only be justified if it complies with the **Gender Directive** and the criteria derived from retained CJEU caselaw. This means that any limitations on the rights of people who are trans to access services must comply , as we will go on to examine, with the principles found in the CJEU cases of C-13/94 ***P v S and Cornwall County Council*** [1996][14], C-117/01 - ***K.B v National Health Service Pensions Agency*** [2004][15], C-423/04 ***Richards v Secretary of State for Work and Pensions*** [2006][16] and C-451/16 ***MB v Secretary of State for Work and Pensions*** [2018][17].

Further evidence of the EU origins of the provisions of the Equality Act that apply to sex discrimination and gender reassignment.

The EU origins of the Equality Act is confirmed by the EU transposition guides to these two directives. These were written by the European Network of Legal Experts in Gender Equality. The European Commission set up this network, as well as a network on non-discrimination, and then merged the two networks into one in December 2014. It is now known as the European Equality Law Network. This network still monitors gender equality and non-discrimination in the UK post Brexit. The network provides reporting on the transposition of and compliance with the gender equality and non-discrimination directives, national court rulings as well as the impact of judgements of the Court of Justice of the European Union and, where appropriate, of the judgements of the European Court of Human Rights on national law, the role of equality bodies as well as legislative and political developments at national level.

The **European Equality Law Network** confirmed in the UK Country report on gender equality in 2024[18] that

"The Equality Act 2010 replaces earlier legislation which had implemented relevant EU directives:

[14] C-13/94 *P v S and Cornwall County Council* [1996] 2 C.M.L.R. 247
[15] C-117/01 - *K.B v National Health Service Pensions Agency* [2004] ECR 2004 1-541
[16] C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR 1-3602
[17] C-451/16 *MB v Secretary of State for Work and Pensions* [2018] ECLI:EU:C:2018:492
[18] The European Network of Legal Experts in gender equality and non-discrimination: UK Country report on gender equality in 2024 is available at **https://www.equalitylaw.eu/downloads/6200-united-kingdom-country-report-gender-equality-2024**

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1) *Council **Directive 2000/78/EC** establishing a general framework for equal treatment in employment and occupation.*
2) *Council **Directive 2004/113/EC** implementing the principle of equal treatment between men and women in the access to and supply of goods and services.*
3) *European Parliament and **Council Directive 2006/54/EC** on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)"*

The Transposition of the Gender Directive into UK law.

The **Explanatory Memorandum to the Sex Discrimination (Amendment of Legislation) Regulations** confirms that these Regulations were introduced to give effect to the Gender Directive. The description of the Regulations at page 1 states that:

> *"The Sex Discrimination (Amendment of Legislation) Regulations 2008 ("the Regulations") amend the Sex Discrimination Act 1975 ("SDA"), the Sex Discrimination (Northern Ireland) Order 1976 ("SDO") and the Public Health Act 1936 to implement Council Directive 2004/113/EC in the UK. This Directive (which, for working purposes is also referred to as the "Gender Directive") implements the principle of equal treatment between men and women in the access to and supply of goods and services."*

Page 5 of the **Explanatory Memorandum to the Sex Discrimination (Amendment of Legislation) Regulations** confirms that it was always the intention to enact the provisions of the Gender Directive into the Equality Act. It says:

> *"Government made the decision that there should be a single consultation package presenting the proposals for implementing the Gender Directive alongside the wider proposals for an Equality Bill flowing from the Discrimination Law Review. A consultation on the Gender Directive alone would have only been on the minimal changes to the Sex Discrimination Act 1975 considered necessary to implement the Gender Directive. By consulting on the Gender Directive and the Discrimination Law Review at the same time, the intention was for consultees to understand how the proposals for implementing the Gender Directive fit into and were a step towards our wider proposals for simplification and harmonisation of discrimination law."*

At the EU level, the **Report on the application of Council Directive 2004/113/EC** (the Gender Directive) implementing the principle of equal treatment between men and women in the access to and supply of goods and services (COM 2015/190) states that:

> *"In conformity with the case law of the CJEU, the scope of the principle of equal treatment for men and women and the prohibition of sex discrimination also applies to discrimination arising from the gender reassignment of a person*." (page 4)

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In the footnote to this statement, the European Commission refers to Case C-13/94 ***P v S and Cornwall County Council*** [1996][19] and Case C-423/04, ***Richards v Secretary for Work and Pensions*** [2006][20], which we are going to go on and look at.

The report on the transposition of the Gender Directive (Directive 2004/113) confirms that the UK is one of five countries that have explicitly included gender reassignment as a specific ground of discrimination in their legislation i.e in the Sex Discrimination (Amendment of Legislation) Regulations, with these provisions then being rolled into the Equality Act.

In this report, the European Commission also makes the observation that:

> *"So far the CJEU has only ruled on gender reassignment. There is no case law concerning gender identity more generally speaking as covered by the protection against sex discrimination, but the Commission considers that the approach should be materially similar."*

The recent CJEU judgment in ***Mousse*** [2025] confirms that the prohibition on sex discrimination also extends to discrimination on the ground of gender identities that do not correspond to sex assigned at birth and which do not include a physical change of gender ('transgender identity').[21] The judgment in this case also highlights the relevance of the **Gender Directive** when deciding questions relating to sex discrimination and gender reassignment. The judgment says:

> *61 In that context, in particular, it will be for the referring court to determine whether there is a risk of discrimination on grounds of gender identity, as claimed by Mousse, in particular in the light of Directive 2004/113 (the Gender Directive), which implements the principle of equal treatment for men and women in the access to and supply of goods and services.*
>
> *62 It should be pointed out, in that regard, that the scope of that directive cannot thus be confined simply to discrimination based on the fact that a person is of one or other gender. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of that directive is also such as to apply to discrimination arising from a change in a person's gender identity (see, by analogy, judgment of 27 Apr 2006, Richards, C-423/04, EU:C:2006:256, paragraph 24 and the case-law cited).*

The Transposition of the Recast Equal Treatment Directive 2006/54/EC into UK law

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[19] N [15]
[20] N [17]
[21] Judgment of 9 January 2025, *Mousse* (C-394/23, EU:C:2025:2, paragraphs 61 and 62). This case was decided two months after the For Women Scotland hearing at the Supreme Court, but three months before the Supreme Court issued its judgment in the case of *FWS*. Therefore, they could have taken the case of *Mousse* into consideration, although as it is post Brexit caselaw they are not required to do so.
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A **February 2009 report** explaining how the **Recast Equal Treatment Directive** had been transposed in all the EU Member States was published by the European Network of Legal Experts.

In relation to the transposition of Directive 2006/54 by the UK, it is noted that the directive had not been explicitly transposed into national law.

> *"In the first place, it seems to me that the assumption is that the Recast Equal Treatment Directive is merely a consolidating piece of legislation which does not impose any new obligations on member states. Secondly, the UK Government is in the process of drafting a single piece of equality legislation intended to replace all or most of the current domestic equality legislation and so is not inclined to spend time on what would be regarded as, at best, relatively trivial matters which might arise under the Recast Equal Treatment Directive*."

In relation to gender reassignment, the report on the transposition of the Recast Equal Treatment Directive observed that:

> *"The Sex Discrimination Act prohibits direct discrimination on grounds of gender reassignment as well as sex. The proposed single Equality Act will extend the prohibition to cover indirect as well as direct discrimination and will impose proactive obligations on public authorities in respect of gender reassignment as well as sex."*

In 2011, the European Network of Legal Experts in the field of gender equality updated the transposition guide relating to the transposition of the Recast Equal Treatment Directive (**Directive 2006/54**).

The 2011 transposition guide in relation to Directive 2006/54 confirmed that

> *"The provisions transposing Directive 2006/54/EC are now to be found in the Equality Act 2010, though neither that Act nor the Sex Discrimination Act 1975 (as amended; hereinafter the SDA) which preceded it were adopted for the purposes of transposition."*

and

> *"National legislation deals in detail with gender reassignment, Section 7 of the Equality Act 2010 now provides that:*
>
> *(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.*
>
> *(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.*
>
> *(3) In relation to the protected characteristic of gender reassignment –*
>
> *(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person.*

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(b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

'Gender reassignment' being defined as a 'protected characteristic', the Equality Act 2010 then prohibits direct and indirect discrimination, harassment and victimisation, etc., related to that ground".

The Defence of rights provisions found in both the Gender Directive and the Recast Equal Treatment Directive

Article 17 of Directive 2006/54 also includes a defence of rights provision, which requires Member States to ensure that

"judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."

This "Defence of rights" provision is also found in **Article 8** of the Gender Directive (**Directive 2004/113**) and both of these provisions confer standing on organisations seeking to bring claims on the grounds of a failure to apply the principle of equal treatment.

So, there is little doubt that the provisions relating to sex discrimination and gender reassignment in the Equality Act were introduced to give effect to EU law and CJEU caselaw, and that people were expected to be able to rely on these legal rights and provisions, including before national courts. The other point to come out of this is that the rights that trans people have been relying on for the last thirty years do not stem from trans rights activists misrepresenting the law to other trans people; these are rights that trans people have had since 1996 as a direct result of EU law and CJEU decisions.

Therefore, the historical provisions of the Sex Discrimination Act are largely irrelevant as a tool for interpreting the Equality Act. The SDA was modified by the **Gender Directive** as a temporary measure whilst the Equality Act was being drafted and became law, and once the Equality Act became law, the Sex Discrimination Act was repealed. In the case of *FWS*, the Equality Act should have been interpreted in light of the provisions of the **Gender Directive**, and the **Recast Equal Treatment Directive,** not the Sex Discrimination Act.

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3) **Third premise: The 1999 Regulations, enacted in response to *P v S*, created a new protected characteristic of a person intending to undergo, or undergoing or having undergone gender reassignment. The 1999 Regulations did not amend the meaning of "man" or "woman" in the SDA 1975 (paras 54-62 of the judgment in *FWS*).**

Whilst this statement is true, this is not the complete picture. The case of ***P v S and Cornwall County Council*** [1996][22] was also used to interpret the **Gender Directive,** which was enacted into UK law through the Equality Act. So, the provisions of the Equality Act that cover sex discrimination and gender reassignment were enacted to give effect to EU law, and it is those provisions that should apply, not the Sex Discrimination Act, which is largely irrelevant. Furthermore, the case of ***P v S and Cornwall County Council*** [1996][23] means that discrimination on the grounds of gender reassignment is considered, under EU law, to be a form of sex discrimination and that as a result of this case, sex, under EU law is not defined in terms of "man" or "woman" but instead people are either one sex or the other and people who have undergone gender reassignment are considered as their legal sex, not their sex at birth.

As most people will never have heard of the case of ***P v S and Cornwall County Council*** [1996][24] or of any of the other CJEU caselaw on sex discrimination and gender reassignment, we think it would be helpful to explain what happened in that case and what the Court of Justice of the European Union decided in subsequent cases.

***P v S and Cornwall County Council* (Case 13/94) [1996] 2 C.M.L.R. 247.**

Facts of the case

P, who was trans, was dismissed from her job after informing her employer of her intention to undergo a male to female gender reassignment operation. P. brought an action based on sexual discrimination.

The European Court of Justice was asked to give a ruling on the following questions:

> *"(1) Having regard to the purpose of Directive 76/207 which is stated in Article 1 to be to put into effect the principle of equal treatment for men and women as regards access to employment, etc., … does the dismissal of a transsexual for a reason related to a gender reassignment constitute a breach of the Directive?*
>
> *(2) Does Article 3 of the Directive, which refers to discrimination on grounds of sex, prohibit treatment of an employee on the grounds of the employee's transsexual state?"*

[22] C-13/94 *P and S and Cornwall County Council* [1996] 2 C.M.L.R. 247
[23] Ibid
[24] Ibid
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The CJEU's decision in this case

The Court held that:

> *"[20] Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.*
>
> *[21] Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong, before undergoing gender reassignment.*
>
> *[22] To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard."*

So, the key points to come out of this case are:

1. According to the CJEU's judgment in this case "the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or the other sex." (paragraph 20 of the judgment)
2. Discrimination on the grounds of gender reassignment **is** discrimination on the grounds of sex.
3. It confirms that since 1996, when the case of ***P v S and Cornwall County Council*** [1996][25] was decided, sex has had a certificated sex reading under EU law, not a biological sex reading.

These principles have been upheld by the CJEU in subsequent cases, such as the case of **Richards v Secretary of State for Work and Pensions**.[26]

The case of *Richards*[27] is a good example of the CJEU's approach to people who have gone through gender reassignment. Ms Richards was born on 28 February 1942, and her birth certificate registered her gender as male. Having been diagnosed as suffering from gender dysphoria, she underwent gender reassignment surgery on 3 May 2001.

On 14 February 2002 she applied to the Secretary of State for Work and Pensions for a retirement pension to be paid as from 28 February 2002, the date on which she turned 60, the age at which a woman born before 6 April 1950 was eligible to receive a retirement pension.

In relation to whether she was entitled to her pension at 60 (on the basis she was a woman) or at 65 (on the basis of her birth sex) the CJEU held that:

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[25] N [15]
[26] C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR 1-3602
[27] C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR 1-3602
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"23. In accordance with settled case-law, the right not to be discriminated against on grounds of sex is one of the fundamental human rights the observance of which the Court has a duty to ensure (see Case 149/77 Defrenne [1978] ECR 1365, paragraphs 26 and 27, and Case C-13/94 P v S. [1996] ECR I-2143, paragraph 19).

24. The scope of Directive 79/7 cannot thus be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of that directive is also such as to apply to discrimination arising from the gender reassignment of the person concerned (see, as regards Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 0040), P. v S. , paragraph 20)."

So, as a matter of EU law, Ms Richards was held to be a woman and therefore entitled to receive her pension from the age of 60, not 65, under one of the other Equal Treatment Directives (**Directive 79/7**).

The cases of ***P v S and Cornwall County Council*** [1996][28], ***K.B v National Health Service Pensions Agency*** [2004][29], C-423/04 ***Richards v Secretary of State for Work and Pensions*** [2006][30] were all decided between 1996-2004, so those cases were all brought before the Gender Recognition Act 2004 came into force.

The more recent case law relating to sex discrimination and gender reassignment – the case of MB v Secretary of State for Work and Pensions (Case 451/16)[31]

This case is important because:

1) It was referred to the CJEU by the UK Supreme Court in August 2016, whilst we were still members of the EU, so the Supreme Court were involved in this case and should therefore be familiar with it.
2) It is a case that was determined after the Gender Recognition Act was introduced, unlike the other caselaw listed above.

M, a transwoman had married while she was a man. After her gender reassignment surgery, M and her wife continued to live together as a married couple. M was granted an interim gender recognition certificate but could only obtain a full certificate if she first applied to have her marriage annulled. The Gender Recognition Act required people who are married to divorce or annul their marriage in order for them to be issued with a Gender Recognition Certificate. This requirement was abolished in December 2014, nine months after the Marriage (Same Sex Couples) Act 2013 permitted same-sex marriages but was not given retrospective effect.

However, M and her wife did not wish their marriage to be annulled. When M reached the age of 60, which

[28] C-13/94 *P v S and Cornwall County Council* [1996] 2 C.M.L.R. 247
[29] C-117/01 - *K.B v National Health Service Pensions Agency* [2004] ECR 2004 1-541
[30] C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR 1-3602
[31] C-451/16 *MB v Secretary of State for Work and Pensions* [2018] ECLI:EU:C:2018:492
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was the pensionable age for a woman, she applied for a state pension. Her application was refused on the basis that, without the certificate, she was still legally a man and was therefore not entitled to a pension until the age of 65.

M appealed against the refusal of a state pension.

The CJEU held in its ruling that:

35 ***"In accordance with the Court's settled case-law,*** *the scope of the latter directive, in view of its purpose and the nature of the rights which it seeks to safeguard, is also such as to apply to discrimination arising from gender reassignment (see, to that effect, judgment of 27 April 2006, Richards, C-423/04, EU:C:2006:256, paragraphs 23 and 24 and the case-law cited). In that regard, although, as it was noted in paragraph 29 of the present judgment, it is for the Member States to establish the conditions for legal recognition of a person's change of gender, the fact remains that, for the purposes of the application of Directive 79/7, persons who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender.*

36 In the present case, the national legislation at issue in the main proceedings makes access by persons who have changed gender to a State retirement pension as from the statutory pensionable age for persons of the acquired gender subject to, inter alia, the annulment of any marriage into which they may have entered before that change. By contrast, according to the information in the file before the Court, that marriage annulment condition does not apply to persons who have retained their birth gender and are married, who accordingly may receive a State retirement pension as from the statutory pensionable age for persons of that gender irrespective of their marital status.

37 It appears, therefore, that that national legislation treats less favourably a person who has changed gender after marrying than it treats a person who has retained his or her birth gender and is married.

38 Such less favourable treatment is based on sex and may constitute direct discrimination within the meaning of Article 4(1) of Directive 79/7."

Key points to come out of the above cases

1) It is settled case law that discrimination on the grounds of gender reassignment **is** sex discrimination. (***P v S and Cornwall County Council*** [1996][32], ***Richards v Secretary of State for Work and Pensions*** [2006][33], ***MB v Secretary of State for Work and Pensions*** [2018][34]

[32] N [15]
[33] N [17]
[34] N [18]
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2) The scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or the other sex.

3) Since 1996, when the case of ***P v S and Cornwall County Council*** [1996][35] was decided, sex has had a certificated sex reading as a matter of EU law, not a biological sex reading.

4) As is clear from Article 2(1)(a) of **Directive 2006/54** (the Recast Equal Treatment Directive), there is direct discrimination based on sex if one person is treated less favourably on grounds of sex than another person is, has been or would be treated in a comparable situation.

5) The rights of trans people to live as their acquired gender do not stem from trans activists misrepresenting the law for the last thirty years – they come from the above provisions of EU law and CJEU caselaw. They are important legal principles that trans people are entitled to rely on. It is worth noting that whilst the Supreme Court is the top court in the UK, the CJEU is the top court in Europe, so in the event of a conflict between a decision of the Supreme Court and a decision of the CJEU, it would normally be the CJEU decision that would be followed.

Can the UK Supreme Court depart from this CJEU caselaw? - the two approaches to this question in the case of *Lipton v BA City Flyer* [2024]

There are two possible answers to this question and interestingly they both come from the same case – the case of ***Lipton v BA City Flyer*** [2024][36] which was decided by the UK Supreme Court last year. For the Supreme Court, an important aspect of the case was to lay down a framework that the higher courts could follow, where the courts were faced with a case where the cause of action started during the transition period, but the case was only heard post Brexit.

One of the questions for the Supreme Court was "*could the Supreme Court depart from CJEU caselaw that was decided before Brexit, when the case started during the transition period?*" However, in the specific case of ***Lipton***[37], none of the parties were actually asking the Supreme Court to depart from previous CJEU caselaw, so the answer to that question was, in essence, theoretical, and involved two separate approaches and answers to that question.

The first of these approaches was put forward by Lord Lloyd Jones, who argued that in that situation the Supreme Court would be obliged to follow CJEU caselaw, in order to give effect to Article 127 and Article 4 of the EU-UK Withdrawal Agreement. However, his was a minority view.

The remainder of the Supreme Court Justices argued that yes, they could depart from previous CJEU caselaw, under Article 6(4) and 6(5) of the EU Withdrawal Act 2018, as amended by the Retained EU Law (Reform and Revocation) Act 2023.

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[35] N [15]
[36] *Lipton v BA City Flyer Ltd* [2024] UKSC 24
[37] *Lipton v BA City Flyer Ltd* [2024] UKSC 24

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Both of these arguments are explained in more detail below and then applied to the case of *FWS*, in order to establish whether the Supreme Court complied with either set of rules.

All of the Supreme Court justices agreed that the law that should be applied was the law that was in force at the time the cause of action accrued i.e. when the case was triggered or started. So, applying that to the case of *FWS*, we can demonstrate that the Supreme Court, when deciding the case of FWS, should have applied the law that was in force during the transition period, which was EU law.

Lord Lloyd-Jones approach to the question of whether the Supreme Court could depart from CJEU caselaw, where a case was started during the transition period.

Lord Lloyd-Jones, between paragraphs 234-243 of the judgment in ***Lipton***, explained the approach that the Supreme Court should take when deciding cases that started during the transition period. His was a minority view, but in his judgment, Lord Lloyd Jones said that:

> *"238. We have seen (paras 223–226 above) that article 127(1) of the Withdrawal Agreement provides that EU law shall be applicable to and in the United Kingdom during the transition period, unless otherwise provided by the Withdrawal Agreement. Article 4(4) provides that provisions of the Withdrawal Agreement referring to EU law (which would appear to include article 127) shall in their interpretation and implementation be interpreted in conformity with the relevant case law of the CJEU handed down before the end of the transition period.*
>
> *Article 127(3) provides that during the transition period the provisions of EU law made applicable by the Withdrawal Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the EU and its member states, and this would also appear to be required by article 4(1). These provisions are given effect within the United Kingdom by section 7A of the 2018 Act which gives domestic courts within the United Kingdom the power to disapply domestic legislation, including the 2018 Act, insofar as it is incompatible with the Withdrawal Agreement.*
>
> *239. "These provisions strongly suggest that the power to depart from retained EU case law conferred by section 6(4) of the 2018 Act* ***only applies in cases where the cause of action accrued after the 31 December 2020.*** [Bold added for emphasis]
>
> *Consider an appeal coming before the Supreme Court after the 31st December 2020 where the claimant's cause of action accrued during the transition period. The defendant invites the court to depart from a pre-Brexit decision of the CJEU which would, if followed, determine the matter in favour of the claimant.* ***If the court were to refuse to apply the relevant CJEU case, there would appear to be at least a serious risk that the United Kingdom would be in breach of articles 4 and 127 of the Withdrawal Agreement.*** [Bold added for emphasis]
>
> *First, it would arguably breach article 127(1) read with article 4(4) which requires judges in the United Kingdom to interpret and apply the EU law in force in the United Kingdom during the transition period*

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"in conformity with the relevant case law of the [CJEU] handed down before the end of the transition period". Secondly, it would arguably breach article 127(1) read with article 127(3) and article 4(1) because the EU law which was supposed to apply during the transition period would not be producing the same legal effects within the United Kingdom as within member states. If the power to depart applied in such a case, it would appear to create the prospect that there would be a different outcome for an alleged breach of EU law arising in the United Kingdom during the transition period compared with a materially identical alleged breach arising in a member state in the same period. It is difficult to see how this could be reconciled with the requirements of the Withdrawal Agreement. (See Secretary of State for Work and Pensions v AT [2024] KB 633, considered at para 226 above.)"

The approach taken by the other Supreme Court justices in the case of *Lipton*[38], on the question of whether the Supreme Court could depart from previous CJEU decisions in relation to cases that started during the transition period.

The majority of the Supreme Court took the view that the Supreme Court and other higher courts (e.g. the Court of Appeal) can depart from retained EU case law (i.e. judgments of the CJEU that were handed down prior to Brexit like ***P v S and Cornwall County Council*** [1996][39] etc, even in cases where causes of action concerned pre-Brexit events, as in the case of *FWS*.

Their justification for this approach rested on section 6 of the EU Withdrawal Act 2018.

Section 6(3) of the EU Withdrawal Act 2018 says:

"Any question as to the validity, meaning or effect of any assimilated EU law is to be decided, so far as that law is unmodified on or after 31st December 2020 and so far as they are relevant to it— (a)in accordance with any assimilated case law."

Section 6(4)(a) goes on to say that "*the Supreme Court is not bound by any assimilated EU case law.".*

However, the Supreme Court can only depart from previous CJEU caselaw like the caselaw cited above[40] if '*it applies the same test as it would apply in deciding whether to depart from its own case law*', which lawyers know as the 1966 Practice Statement. Before 1966, if the House of Lords had made an incorrect decision then they were stuck with it – they couldn't change it. However, after 1966, the top court in the UK was allowed to depart from previous decisions "*when it considers it right to do so"*. This is the test found in the section 6(5) of the EU Withdrawal Act which says:

*"In deciding whether to depart from any assimilated EU case law by virtue of subsection (4)(a) the Supreme Court **must** apply the same test as it would apply in deciding whether to depart from its own case law."*

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[38] *Lipton v BA City Flyer Ltd* [2024] UKSC 24

[39] N [15]

[40] Such as *P v S and Cornwall County Council* (Case 13/94) [1996] 2 C.M.L.R. 247, C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR 1-3602), and C-451/16 *MB v Secretary of State for Work and Pensions* [2018] ECLI:EU:C:2018:492

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Now, the Retained EU Law (Revocation and Reform) Act 2023 was supposed to make it a lot easier for the courts to depart from previous CJEU rulings. However, on the 18th September 2024 Labour **revoked** those provisions[41], as part of their EU-UK reset. This meant that when the Supreme Court hearing for FWS took place in November 2024 the position was (if the Supreme Court wanted to depart from previous CJEU caselaw like ***P v S and Cornwall County Council*** [1996][42] etc) then they were required to apply the same tests that they would apply if they were looking to depart from their own case law, as explained above. So, did they meet the requirements of that test?

In January 2025, the Court of Appeal came out with a useful summary of when the higher courts can depart from previous CJEU caselaw[43], in a case called *Merck Serono v Comptroller-General of Patents* [2025]. The first test that the Supreme Court would have to meet in order to depart from previous CJEU caselaw is it would have to show that the decisions in ***P v S and Cornwall County Council*** [1996][44], ***Richards v Secretary of State for Work and Pensions*** [2006][45] and ***MB v Secretary of State for Work and Pensions*** [2018][46] were wrongly decided by the CJEU.

If the decisions of the CJEU were not wrong in these cases, then the Supreme Court cannot depart from them and is therefore required to apply the principles found in those cases.

This was confirmed in the case of ***Merck Serono***[47], where at paragraph 18 the court said:

> *"the starting point must be to examine the criticisms levelled at the assimilated EU case law to see if they are justified. If not then the application of the Practice Statement does not arise."*

Birss LJ suggested that, first, a litigant urging the court to depart from assimilated case law must demonstrate that "*the criticisms levelled at the assimilated EU case law […] are justified".* If they are not, "*then the application of the Practice Statement does not arise".*

So, did For Women Scotland, in their written arguments to the Supreme Court, criticise the decisions in in ***P v S and Cornwall County Council*** [1996][48], ***Richards v Secretary of State for Work and Pensions*** [2006][49] and ***MB v Secretary of State for Work and Pensions*** [2018][50] and show that the CJEU had wrongly decided these cases? No, they did not argue that. All they say in their written submissions to the Supreme Court at page 7, in relation to the case of ***P v S and Cornwall County Council*** [1996][51] is:

> *"38. While it [the CJEU in Case C-13/94 P v S and Cornwall County Council ECLI:EU:C:1996:170 [1996] ECR I-2143 [1996] ICR 795] recognised that discrimination on the basis of gender*

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[41] **See https://www.taylorwessing.com/en/insights-and-events/insights/2024/10/section-6-reul-act-did-not-come-into-force-after-all**
[42] N [15]
[43] *Merck Serono v Comptroller-General of Patents* [2025] EWCA Civ 45
[44] N [15]
[45] N [17]
[46] N [18]
[47] *Merck Serono v Comptroller-General of Patents* [2025] EWCA Civ 45
[48] N [15]
[49] N [17]
[50] N [18]
[51] N [15]

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reassignment was most likely to be sex discrimination, neither it nor Chief Constable, West Yorkshire Police v A (No 2) [2004] UKHL 21 [2005] 1 AC 51 which anticipated the Gender Recognition Act 2004, is authority for the proposition that a transgender person possesses the protected characteristic of the sex in which they present. These cases do not vouch the proposition that sex and gender reassignment are to be conflated or combined, particularly in light of subsequent legislation on the matter in the form of the 2010 Act which maintained the distinct categories of protected characteristics, and did so in the knowledge that the circumstances in which a person might acquire a gender recognition certificate under the 2004 Act were limited."

So, For Women Scotland were not arguing that the decision in ***P v S and Cornwall County Council***[52] was wrongly decided by the CJEU; instead, they argued that in their view this case isn't '*authority for the proposition that a transgender person possesses the protected characteristic of the sex in which they present.'*[53] So, *FWS* did not argue that the decision in *P v S* was wrongly decided by the CJEU and nor did they invite the Supreme Court to depart from it.[54]

For Women Scotland also did not mention in their written submissions the cases of ***Richards v Secretary of State for Work and Pensions*** [2006] and ***MB v Secretary of State for Work and Pensions*** [2018] so one has to presume that they also considered these cases to be properly decided. So, can the Supreme Court justify departing from the line of authority established in the cases of **P v S and Cornwall County Council**[1996], **Richards v Secretary of State for Work and Pensions** [2006] and **MB v Secretary of State for Work and Pensions** [2018]?

At paragraph 59 in the judgment relating to ***Merck Serono***[55], Lord Justice Arnold confirmed that:

"it remains the will of Parliament that legislation should continue to be harmonised with that of the EU. In those circumstances, the UK courts should continue to interpret the legislation in harmony with the Court of Justice unless convinced that the Court of Justice's interpretation is wrong."

So, did the Supreme Court argue in its judgment that the CJEU interpretation in the case of ***P v S and Cornwall County Council*** [1996][56] was wrongly decided by the CJEU? All the Supreme Court said in relation to that case in the *FWS* judgment was:

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[52] *P v S and Cornwall County Council* (Case 13/94) [1996]

[53] Other views are available.

[54] This is confirmed by a procedural point. When a party applies to the Supreme Court to have a case heard, they have to specify in their application, whether they are planning on inviting the Supreme Court to depart from previous CJEU caselaw. If a claimant is looking to argue that the Supreme Court should depart from previous CJEU caselaw, then the Supreme Court will convene an extended panel of seven or even nine judges to hear the case. Only five Supreme Court Justices heard the case of *FWS*, so therefore it would appear that For Women Scotland were not inviting the Supreme Court to depart from the CJEU decisions in C-13/94 *P v S and Cornwall County Council*[1996] 2 C.M.L.R. 247, C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR 1-3602 and C-451/16 *MB v Secretary of State for Work and Pensions* [2018] ECLI:EU:C:2018:492

[55] *Merck Serono v Comptroller-General of Patents* [2025] EWCA Civ 45

[56] N [15]

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> "*55. In P v S and Cornwall County Council (Case C-13/94) [1996] ICR 795, [1996] ECR I-2143 ("P v S") the European Court of Justice considered the scope of the Equal Treatment Directive, that is Council Directive 76/207/EEC (OJ 1976 L39 p 40) in the context of alleged discrimination connected to gender reassignment. The applicant (a biological male employee) was dismissed by Cornwall County Council after telling her employer that she intended to undergo gender reassignment surgery. She complained of unlawful discrimination on the grounds of her sex. The Judge Rapporteur recorded that the industrial tribunal "found that there was no remedy under the Sex Discrimination Act 1975, the applicable United Kingdom statute, since English law took cognisance only of situations in which men or women were treated differently because they belonged to one sex or the other, and did not recognise a transsexual condition in addition to the two sexes. Under English law, the applicant was at all times a male" (para 7). The Court at para 18 held that the Directive was "simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law". The right not to be discriminated against on grounds of sex was, the Court said, a fundamental human right and accordingly the Directive also applied to discrimination arising from gender reassignment (para 20).*

The Supreme Court have correctly cited the key principle that came out of the case of ***P v S and Cornwall County Council*** [1996][57] – that discrimination on the grounds of gender reassignment is discrimination on the grounds of sex, but they did not apply those principles to the case of *FWS.* Nor do they appear to recognise that the provisions of the various Equal Treatment Directives were given effect in UK law via the Equality Act 2010. They do not mention the other key cases at all. There is no indication in the judgment that they are of the view that the CJEU's interpretation in any of those cases was wrongly decided, and nowhere in the judgment in *FWS* have they said so.

Therefore, in the absence of any statement to the contrary, the presumption must be that the Supreme Court was convinced that the CJEU decisions in ***P v S and Cornwall County Council*** [1996][58], ***Richards v Secretary of State for Work and Pensions*** [2006][59], and ***MB v Secretary of State for Work and Pensions*** [2018][60] were correctly decided.

Consequently, if the Supreme Court does not consider that the CJEU's interpretation was wrong, then the 1966 Practice Statement does not apply and they are legally required, under s6(3) and 6(5) of the EU Withdrawal Act to interpret the Equality Act in accordance with the principles derived from the above-mentioned CJEU caselaw. Which they did not do in this case. The decision in *FWS* directly conflicts and departs from this CJEU caselaw, without giving any justification for doing so. Premise 12 of the judgment in *FWS* states that "Gender reassignment and sex are separate bases for discrimination and inequality" which runs completely contrary to what the CJEU has previously decided in the above cases. The CJEU has

[57] N [15]
[58] N [15]
[59] N [17]
[60] N [18]
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consistently held that discrimination on the grounds of gender reassignment is discrimination on the grounds of sex; they are not separate bases for discrimination, they are both aspects of sex discrimination. From an EU perspective, this is settled law.

Therefore, the Supreme Court has not complied with s6 of the EU Withdrawal Act 2018. S6(3) specifies that

> "*Any question as to the validity, meaning or effect of any assimilated EU law* (such as the Equality Act) *is to be decided, so far as that law is unmodified on or after 31st December 2020 and so far as they are relevant to it— (a)in accordance with any assimilated case law."*

While the Supreme Court is not bound by pre-Brexit CJEU caselaw[61], if it wants to depart from previous CJEU caselaw, then it ***must*** *apply the same test as it would apply in deciding whether to depart from its own case law,"*[62] which it hasn't done.

Applying Lord Lloyd Jones approach to the case of *FWS*, the answer to the question "Can the Supreme Court depart from all of the above, trans supportive caselaw", would be no because:

1) The case started during the transition period.

2) Article 127(1) of the Withdrawal Agreement provides that EU law shall be applicable to and in the United Kingdom during the transition period.

3) Article 4(4) provides that provisions of the Withdrawal Agreement referring to EU law shall in their interpretation and implementation be interpreted in conformity with the relevant case law of the CJEU handed down before the end of the transition period. Therefore, on that basis, the UK Supreme Court should have interpreted the Equality Act 2010 in conformity with the cases of ***P v S and Cornwall County Council*** [63], ***Richards v Secretary of State for Work and Pensions***[64] and ***MB v Secretary of State for Work and Pensions***[65] described above.

4) Article 127(3) provides that during the transition period the provisions of EU law made applicable by the Withdrawal Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the EU and its member states, and this would also appear to be required by article 4(1) of the Withdrawal Agreement. The judgment in the case of *FWS* would not be replicated in an EU Member State, as the judgment in *FWS* conflicts with EU law, so the Supreme Court is arguably in breach of this requirement.

5) Lord Lloyd Jones therefore concludes that these provisions strongly suggest that the power to depart from retained EU case law conferred by section 6(4) of the EU Withdrawal Act 2018 **only applies in cases where the cause of action accrued after the 31 December 2020**. In the case of *FWS*, the cause of action took place in May/June 2020, therefore, on that basis, the UK Supreme Court, in

[61] S6(4)(a) of the EU Withdrawal Act
[62] S6(5) of the EU Withdrawal Act 2018
[63] C-13/94 *P v S and Cornwall County Council* [1996] 2 C.M.L.R. 247,
[64] N [17]
[65] N [18]
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relation to the case of *FWS*, should not have departed from the key CJEU cases described above[66] and instead should have applied the certificated sex principles that flow from those CJEU decisions, when interpreting the Equality Act 2010, and given a ruling that complied with that caselaw.

6) In his judgment in the case of ***Lipton***[67], Lord Lloyd Jones gives an example of the problems that the UK Supreme Court could trigger if it departed from CJEU caselaw, in relation to a case that started before the 31 December 2020, like the case of *FWS*. He says:

"Consider an appeal coming before the Supreme Court after the 31st December 2020 where the claimant's cause of action accrued during the transition period. The defendant invites the court to depart from a pre-Brexit decision of the CJEU which would, if followed, determine the matter in favour of the claimant. He concludes:

"If the court were to refuse to apply the relevant CJEU case, there would appear to be at least a serious risk that the United Kingdom would be in breach of articles 4 and 127 of the Withdrawal Agreement." [bolded for emphasis]

Application of the alternative method of analysis and conclusion

We believe that this analysis is correct, and that the UK Supreme Court, by refusing to apply the relevant CJEU caselaw in the case of *FWS*, has created a serious risk that the UK is in breach of Articles 4 and 127 of the Withdrawal Agreement, on the basis that:

(i) The Supreme Court has arguably breached article 127(1) read with article 4(4) which requires judges in the United Kingdom to interpret and apply the EU law in force in the United Kingdom during the transition period "in conformity with the relevant case law of the [CJEU] handed down before the end of the transition period".

(ii) Secondly, the Supreme Court has arguably breached, in the specific case of *FWS*, article 127(1) read with article 127(3) and article 4(1) because EU law, which was supposed to apply during the transition period would not be producing the same legal effects within the United Kingdom as within member states. If the power to depart applied in such a case, it would appear to create the prospect that there would be a different outcome for an alleged breach of EU law arising in the United Kingdom during the transition period compared with a materially identical alleged breach arising in a member state in the same period. It is difficult to see how this could be reconciled with the requirements of the Withdrawal Agreement.[68] This point was discussed at paragraph 226 of ***Lipton***, where it was pointed out that in the case of **AT v Secretary of State for Work and Pensions [2023]** EWCA Civ 1307 Green LJ observed at paragraph 85 that Article 4(1) of the EU-UK Withdrawal Agreement is '*on its face a mandatory,*

[66] C-13/94 *P v S and Cornwall County Council* [1996] 2 C.M.L.R. 247, C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR 1-3602 and C-451/16 *MB v Secretary of State for Work and Pensions* [2018] ECLI:EU:C:2018:492

[67] *Lipton v BA City Flyer Ltd* [2024] UKSC 24

[68] See *Secretary of State for Work and Pensions v AT* [2024] KB 633*, considered at para 226 of Lipton.*

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*outcome driven rule: it **requires** that the provisions of the [Withdrawal Agreement] produce the same outcome in the UK and the EU Member States."*

Therefore, under this analysis, the UK Supreme Court in the case of *FWS* has refused to apply the relevant CJEU caselaw (***P v S and Cornwall County Council*** [1996][69] etc) which it should have done, and as a consequence the UK is arguably in breach of the above provisions of the Withdrawal Agreement.

Therefore, in relation to the question, can the Supreme Court depart from the principles established by the previous CJEU cases of ***P v S and Cornwall County Council*** [1996][70] ***Richards v Secretary of State for Work and Pensions*** [2006][71] and ***MB v Secretary of State for Work and Pensions*** [2018][72] then either:

1. Lord Lloyd Jones analysis was correct, and the UK, via the decision of the Supreme Court in *FWS*, has breached Articles 4 and 127 of the EU-UK Withdrawal Agreement, by not interpreting and applying the EU law in force in the United Kingdom during the transition period "in conformity with the relevant case law of the [CJEU] handed down before the end of the transition period" and nor have they produced "the same legal effects within the United Kingdom as within member states", or

2. The alternative view put forward by the majority of the Supreme Court justices in the case of ***Lipton***[73] is correct, and the Supreme Court has the power to depart from CJEU caselaw that was decided before Brexit, but only if they can show that the decisions in ***P v S and Cornwall County Council*** [1996][74], ***Richards v Secretary of State for Work and Pensions*** [2006][75] and ***MB v Secretary of State for Work and Pensions*** [2018][76] were wrongly decided by the CJEU. They haven't shown that, so therefore their decision to depart from the above cases and not apply them cannot be justified.

It is worth noting that in 2022 the European Commission issued an infringement action[77] against the UK Supreme Court, for failing to interpret and apply EU law correctly during the transition period, in breach of Article 127(1) of the EU-UK Withdrawal Agreement. In a scathing judgment, the CJEU agreed that the UK Supreme Court had not applied EU law correctly, in relation to cases that started during the transition period or prior to Brexit. Therefore, the Supreme Court has previously been held to have infringed EU law and the applicable provisions of the EU-UK Withdrawal Agreement, in relation to cases that started during the transition period, or prior to Brexit. There appears to be substantial confusion regarding how the EU-UK Withdrawal Agreement is expected to apply in the UK, in relation to cases that started during the transition

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[69] N [15]
[70] N [15]
[71] N [17]
[72] N [18]
[73] *Lipton v BA City Flyer Ltd* [2024] UKSC 24
[74] N [15]
[75] N [17]
[76] N [18]
[77] Case 516/2022, European Commission v UK, see **https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62022CJ0516** Judgment in this case was issued in March 2024, and the case of *FWS* was heard in November 2024, a mere few months later.

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period. Is Lord Lloyd Jones analysis the correct one, or not? It would be helpful to have this question clarified, which concerns the interpretation of the EU-UK Withdrawal Agreement.

Therefore, while it is true that the 1999 Regulations, enacted in response to ***P v S and Cornwall County Council*** [1996][78], created a new protected characteristic of a person intending to undergo, or undergoing or having undergone gender reassignment, that is not the complete picture. The case of ***P v S and Cornwall County Council***[79], when interpreted in line with the **Gender Directive**, was also incorporated into the provisions of the Equality Act that related to sex discrimination, pregnancy, maternity and gender reassignment. Therefore, it is irrelevant that the 1999 Regulations did not amend the meaning of "man" or "woman" in the SDA 1975, because the **Gender Directive** did and they both had their roots in the case of ***P v S and Cornwall County Council*** [1996].[80]

Furthermore, the cases of ***P v S and Cornwall County Council*** [1996][81], ***Richards v Secretary of State for Work and Pensions*** [2006][82] and ***MB v Secretary of State for Work and Pensions*** [2018][83] form part of a long line of authority by the CJEU. Given that the case of *FWS* started during the transition period, one of the key questions is whether the Supreme Court can depart from these decisions? Under Lord Lloyd Jones analysis the answer to that question is no, and even if the alternative analysis is adopted, the Supreme Court, in the case of *FWS*, does not appear to have identified that these decisions were wrongly decided by the CJEU, in which case the Supreme Court is required to uphold and follow those decisions, and should have decided the case of *FWS* in line with those principles.

[78] N [15]
[79] N [15]
[80] N [15]
[81] N [15]
[82] N [17]
[83] N [18]

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4) **Premise Four: The GRA 2004 did not amend the meaning of "man" and "woman" in the SDA 1975 (para 80 of the judgment).**

Whilst it is true that the GRA 2004 did not amend the meaning of "man" and "woman" in the Sex Discrimination Act 1975, the Sex Discrimination Act 1975 was amended by the **Gender Directive.**

Page 177 of the **Discrimination Law Review A framework for fairness; Proposals for a Single Equality Bill for Great Britain** explains that:

> ***Definition of indirect discrimination***
>
> *B.8 The Gender Directive defines indirect discrimination as:*
>
> *"where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary".*
>
> *B.9 A very similar definition of indirect discrimination is already used in the Sex Discrimination Act in relation to employment and vocational training, as a result of amendments made by the Employment Equality (Sex Discrimination) Regulations 2005, which implemented the Equal Treatment Amendment Directive. The definition in section 1(2)(b) of the Sex Discrimination Act is as follows:*
>
> *"a person discriminates against a woman if he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but*
>
> *(i) which puts or would put women at a particular disadvantage when compared with men,*
>
> *(ii) which puts her at that disadvantage, and*
>
> *(iii) which he cannot show to be a proportionate means of achieving a legitimate aim".*
>
> *B.10 In order to implement the Gender Directive, we intend to amend the Sex Discrimination Act so that the above definition of indirect discrimination, which currently applies in relation to employment and vocational training, also applies to the field of goods, facilities or services and premises.*

As we have previously established, the **Gender Directive** was supposed to be implemented by the 21st December 2007, and as the Equality Bill process had only just started, the Labour Government of the day implemented the **Gender Directive**, as a temporary measure, by amending the Sex Discrimination Act using the Sex Discrimination (Amendment of Legislation) Regulations 2008 which came into force on 6 April 2008.

The Government confirmed[84] that:

> *"These Regulations amended both the Sex Discrimination Act 1975 and the Sex Discrimination (Northern Ireland) Order 1976.*

[84] In the document "**The Equality Bill – Government response to the consultation** p188

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16.3 The Gender Directive implements the principle of equal treatment between men and women in relation to the access to and supply of goods and services. The Sex Discrimination Act and the Sex Discrimination Order, which apply to both women and men, are the main pieces of legislation in Great Britain and Northern Ireland respectively which prohibit certain kinds of discrimination on the ground of sex, including gender reassignment.

16.4 In some respects the Sex Discrimination Act and Sex Discrimination Order already provided wider protection than that required by the Gender Directive and already went a long way towards meeting the United Kingdom's obligations under it.

However, some amendments had to be made to the Act and the Order to make them compatible with the Directive.

One of those amendments that needed to be made to the Sex Discrimination Act to bring it in line with the **Gender Directive** was to amend the definition of indirect discrimination and dispense with the terms "man" and "woman". The Sex Discrimination Act was therefore amended to reflect this gender-neutral definition, so the **Gender Directive** dispensed with the historical terms "men" and "women", which were found in the Sex Discrimination Act, and replaced that definition with a gender-neutral reference regarding provisions, criterion or practices that "*put persons of one sex at a particular disadvantage compared with persons of the other sex.".* The Sex Discrimination (Amendment of Legislation) Regulations was used to bring in the changes required by the **Gender Directive** by the deadline for transposition, and then these changes were then incorporated into the Equality Act. Once the Equality Act 2010 came into force the Sex Discrimination (Amendment of Legislation) Regulations were repealed.

The current definition of indirect discrimination in the Equality Act 2010 is gender neutral; the terms "man" and "woman" are not used at all. S19 of the Equality Act 2010 defines indirect discrimination as follows:

(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a)A applies, or would apply, it to persons with whom B does not share the characteristic,

(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c)it puts, or would put, B at that disadvantage, and

(d)A cannot show it to be a proportionate means of achieving a legitimate aim.

As the gender-neutral definitions outlined above are different from the terms "man" and "woman" used originally in the Sex Discrimination Act 1975, those gender specific terms have been repealed, and are therefore irrelevant for the purposes of interpreting the Equality Act, as the definition of sex found in the

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Equality Act is not based on the Sex Discrimination Act but on the gender neutral definition found in the **Gender Directive.**

Furthermore, as the Equality Act gave effect to the **Gender Directive** while we were members of the EU, it is worth bearing in mind that in the event of a conflict between the gender-neutral definition of sex found in the **Gender Directive**, and the definition of sex found in the Sex Discrimination Act 1975, the **Gender Directive** would have been followed as a matter of EU law as it would have had primacy.

So, if the Equality Act was interpreting in conformity with EU law, then the gender-neutral definition of sex in the Directive should have been followed. The Supreme Court should not have followed the repealed definition of sex found in the Sex Discrimination Act 1975, which hasn't been in force since the 1st October 2010, when the Equality Act came in. The **Gender Directive** superseded the Sex Discrimination Act, and the gender-neutral definition of sex has been in force for the last 15 years.

Therefore, it is illogical for the Supreme Court to try and argue that the fact that the GRA 2004 did not amend the meaning of "man" and "woman" in the SDA 1975 is at all relevant, as they should have interpreted the Equality Act in line with the **Gender Directive** (which also came out in 2004) and EU law, not in line with the Sex Discrimination Act 1975, which was repealed by the Equality Act and hasn't been law since 2010.

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5) **Premise 5: Section 9(3) of the GRA 2004 disapplies the rule in section 9(1) of that Act where the words of legislation, enacted before or after the commencement of the GRA 2004, are on careful consideration interpreted in their context and having regard to their purpose to be inconsistent with that rule. It is not necessary that there are express words disapplying the rule in section 9(1) of the GRA 2004 or that such disapplication arises by necessary implication as the legality principle does not apply (paras 99-104).**

What the Gender Recognition Act says is:

> *"S9(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).*
>
> *S9(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation."*

On that basis, we could interpret s9(1) of the Gender Recognition Act in line with the **Gender Directive** and its certificated sex reading, following the case of ***P v S and Cornwall County Council*** [1996][85]. The **Gender Directive** is an enactment, so it could certainly be argued as an alternative that the Equality Act and the GRA 2004 should be interpreted using the **Gender Directive**, read in the light of the case **of *P v S and Cornwall County Council*** [1996], rather than the Sex Discrimination Act. There is nothing in s9(3) of the GRA 2004 that says that the GRA can only be interpreted by the Sex Discrimination Act and given the fact that the Sex Discrimination Act is broadly irrelevant when interpreting the Equality Act it would make far more sense for the Equality Act to be interpreted according to the **Gender Directive.**

It is a moot point whether it could reasonably be said that the Equality Act 2010 "made provision" for the whole Equality Act to "enact out" of s. 9(1) of the Gender Recognition Act 2004, by invoking s9(3) of the Gender Recognition Act. Whilst it is arguable that there are some sections in the Equality Act which can more sensibly be read in a "biological" sense, it doesn't follow from that the entirety of the Equality Act 2010 shouldn't be subject to Article 9(1) of the GRA. The Court seems to have read "subject to provision made" as if it was the same as "unless the contrary intention appears", without any obvious justification.

It's also worth making the point the Gender Recognition Act 2004 was an act that was created in response to the European Court of Human Rights finding that the UK had breached its obligations under human rights law in not providing a mechanism whereby trans people could legally transition. The GRA was created to correct that lack and so created new rights for trans people and enabled trans people to apply for a GRC. It seems unlikely, when drafting the GRA 2004, that the drafters expected a court to invoke s9(3) of the GRA to the Sex Discrimination Act 1975, which was created at a point in time when trans rights didn't exist. It is deeply problematic that the Supreme Court has reject the submission that the carve out in section 9(3) only operates in respect of future legislation and not legislation, such as the SDA 1975, which was already enacted at the date when the GRA 2004 was enacted. If the Supreme Court considers it can do that, then on that basis, a

[85] N [15]

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court could just strip away all rights by just comparing existing rights to an act that was passed before those rights existed.

There is a very long-standing legal maxim that a legislative enactment ought to be prospective, not retrospective, in its operation. So, the core rule is that legislation or the interpretation of legislation can change the law going forward, but not retrospectively.[86] According to Brooms Legal Maxims:

> *"Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect of transactions or considered already past, must be deemed retrospective in its operation and opposed to sound principles of jurisprudence."*

The retrospective application of s9(3) of the GRA 2004 to the Equality Act is particularly unconscionable given that if the case of FWS had been heard between 2004, when the GRA 2004 and the **Gender Directive** 2004 became law, and before 2008, when the SDA 1975 still applied and sex under the SDA was defined in terms of "man" and "woman", then those provisions of the Sex Discrimination Act 1975 would have been declared incompatible with the **Gender Directive** and the GRA 2004, and the courts would have been compelled to come to a conforming interpretation in accordance with EU law. This would have resulted in the biological reading of sex found in the Sex Discrimination Act 1975 being set aside.

[86] The prohibition against retrospective application is also found in the ECHR.

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6) **Premise 6: The context in which the EA 2010 was enacted was therefore that the SDA 1975 definitions of "man" and "woman" referred to biological sex and trans people had the protected characteristic of gender reassignment.**

This premise is quoted in the summary of the Supreme Courts argument in *FWS*, which is found at paragraph 265, but there are no references in the judgment itself to this point.

In any case, the context in which the Equality Act 2010 was enacted is not that the SDA 1975 definitions of "man" and "woman" referred to biological sex and trans people had the protected characteristic of gender reassignment. Instead, the context in which the Equality Act was enacted is:

- The Sex Discrimination Act 1975 was enacted in 1975. It did define sex in terms of "man" and "woman".
- The case of **P v S** was decided in 1996.
- The **Gender Directive** became law in 2004 and had to be enacted into UK law by the 21 December 2007.
- When the Equality Act was being drafted, one of the reasons for its creation was to give effect to the **Gender Directive.** It was also recognised by the Labour Government of the day that the provisions of the **Gender Directive**, taken together with the case of ***P v S and Cornwall County Council*** [1996][87], meant that the UK Government were required to outlaw discrimination on the grounds of gender reassignment as an aspect of discrimination on the grounds of sex. Therefore, the definition of sex in the Sex Discrimination Act was amended to a more gender-neutral, trans inclusive definition of sex, in line with settled CJEU caselaw.
- As the Equality Act was not going to be ready by the 21st December 2007, the government enacted the provisions of the **Gender Directive** by amending the Sex Discrimination Act 1975, to bring it in line with the gender-neutral provisions of the **Gender Directive.** This was done via the Sex Discrimination (Amendment of Legislation) Regulations 2008 which came into force on 6 April 2008.
- The provisions of the **Gender Directive** relating to sex discrimination, gender reassignment, maternity and pregnancy, were then rolled into the Equality Act 2010. Schedule 27 repealed the entirety of the Sex Discrimination (Amendment of Legislation) Regulations 2008, once the Equality Act came into force.
- The Sex Discrimination Act 1975 was repealed once the Equality Act 2010 came into force, as it was no longer relevant. The provisions of the **Gender Directive,** taken with CJEU caselaw, defined sex using a certificated sex reading; under the Directive people are either one sex or the other, they are not referred to as men and women. This gender-neutral definition of sex therefore applied from the 6th April 2008, when the Sex Discrimination (Amendment of Legislation) Regulations came into force and these provisions were then rolled into the Equality Act 2010.

[87] N [15]

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- Therefore, the references to “men” and “women” found in the Sex Discrimination Act were over-ridden by the **Gender Directive** and superseded those earlier definitions of sex.

The Equality Act was therefore drafted with a trans inclusive definition of sex built in from the very beginning.

We can see this by looking in detail at some specific provisions. For example, according to the **Discrimination Law Review**, the **Gender Directive** defines indirect discrimination as:

> *“where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.*

It is worth noting that this definition does not mention men and women at all – it is gender neutral, reflecting the approach taken in ***P v S and Cornwall County Council*** [1996][88] and subsequent CJEU caselaw and it – quite deliberately – doesn’t refer to biological sex, just persons of the other sex. The same approach is also seen in section 11 of the Equality Act, which defines sex as:

> *“In relation to the protected characteristic of sex—*
>
> *(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman.*
>
> *(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.”*

The Equality Act definition of sex reflects the judgment in ***P v S and Cornwall County Council*** [1996][89], which says:

> *“[20] Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.*

Therefore, sex, as a matter of EU law, is defined on the basis that people can be either men or women, but people who have undergone gender reassignment are deemed to be the sex that they have transitioned to. This point is exactly replicated in the definition of sex found in the Equality Act 2010. If a person has the protected characteristic of gender reassignment, and they are a transwoman, then under the **Gender Directive**, interpreted in line with the case of ***P v S and Cornwall County Council*** [1996][90], and the Equality Act they are a woman. The EU applies a certificated sex reading to sex not a biological sex approach and has long held that discrimination on the grounds of gender reassignment constitutes discrimination on the

[88] N [15]
[89] N [15] paragraph 20
[90] N [15]
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grounds of sex. This can be seen in paragraph 21 of the judgment in ***P v S and Cornwall County Council*** [1996][91], which held that discrimination on the grounds of gender reassignment is based

> *"essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong, before undergoing gender reassignment."*

The **Discrimination Law Review** went on to say, at page 177, that:

> *'a very similar definition of indirect discrimination is already used in the Sex Discrimination Act in relation to employment and vocational training, as a result of amendments made by the Employment Equality (Sex Discrimination) Regulations 2005, which implemented the Equal Treatment Amendment Directive. The definition in section 1(2)(b) of the Sex Discrimination Act[92] is as follows:*
>
> *"a person discriminates against a woman if he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but*
>
> *(i) which puts or would put women at a particular disadvantage when compared with men,*
>
> *(ii) which puts her at that disadvantage, and*
>
> *(iii) which he cannot show to be a proportionate means of achieving a legitimate aim".*

And that:

> *"In order to implement the Gender Directive, we intend to amend the Sex Discrimination Act so that the above definition of indirect discrimination, which currently applies in relation to employment and vocational training, also applies to the field of goods, facilities or services and premises.*

Which is what they did – the current definition of indirect discrimination found in the Equality Act doesn't refer to biological sex. It says:

> *(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> *(c) (c)it puts, or would put, B at that disadvantage, and*

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[91] N [15]

[92] As amended by the Employment Equality (Sex Discrimination) Regulations 2005/2467 reg. 3, so this would have been the version of the Sex Discrimination Act that was in force when the Single Equality Bill was being drafted.

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(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

From this, it is clear that the Supreme Courts contextual understanding of the background to the Equality Act that *"The context in which the EA 2010 was enacted was therefore that the SDA 1975 definitions of "man" and "woman" referred to biological sex and trans people had the protected characteristic of gender reassignment"* demonstrates a lack of awareness and understanding of the context in which the Equality Act was drafted.

This premise, and premise 9, go to the heart of the judgment in FWS. If these premises are factually correct and decided in accordance with all relevant facts and law, then the conclusion in *FWS* is more likely to be justified. However, both of these premises are based on factually incorrect assumptions, that do not reflect the EU law background to the Equality Act, and nor do they acknowledge the amendments made to both the Sex Discrimination Act 1975 by the Sex Discrimination (Amendment of Legislation) Regulations 2008 and the Equality Act 2010, in order to give effect to EU law.

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7) **Premise 7: The EA 2010 is an amending and consolidating statute. It enacts group- based protections against discrimination on the grounds of sex and gender reassignment and imposes duties of positive action (paras 113, 142-149 of the judgment).**

The Equality Act is an amending and consolidating statute, but it doesn't just amend and consolidate UK law, it also amends, consolidates and gives effect to EU law.

Paragraph 113 of the *FWS* judgment identifies that:

> *"The Equality Act is both an amending and consolidating statute which was intended, among other things, to "reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics" (long title). It consolidated and reformed the Equal Pay Act 1970, the SDA 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995 and other (primarily secondary) legislation addressing unlawful discrimination in other specific areas (religion or belief, sexual orientation, and age) to strengthen the law in order to support greater progress on equality."*

While it is true that the Equality Act amended all of those things, the judgment fails to mention that it also amends UK law to give effect to the Equal Treatment Directives, which includes the Gender Directive (**Directive 2004/113**) and the **Recast Equal Treatment Directive** (Directive 2006/54), even though this is specifically mentioned in the **Explanatory notes to the Equality Bill,** at page 2, where the notes identify the main European Directives affecting domestic discrimination legislation as:

- Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.
- Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by the European Parliament and Council Directive 2002/73/EC.
- Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Race Directive).
- Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.
- Council Directive 2004/113/EC (the Gender Directive) implementing the principle of equal treatment between men and women in the access to and supply of goods and services.
- European Parliament and Council Directive 2006/54/EC (the Recast Equal Treatment Directive) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

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The **Explanatory notes to the Equality Bill** at page 13 identify that:

> *"The Bill is a rights-enhancing piece of legislation the majority of which is required to implement the UK's obligations under EU law."*

Therefore, for the Supreme Court to exclude all EU law when interpreting the Equality Act is incomprehensible, given that most of the Equality Act gives effect to obligations under EU law.

It is also worth mentioning that the duties of positive action stem from Article 6 of the **Gender Directive.** According to Article 6 of the Directive:

> *"the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex with a view to ensuring full equality in practice between men and women."*

The **Explanatory notes to the Equality Bill,** at page 131, confirm that the duties of positive action are derived from EU law. It says:

> *"Clause 157 of the Equality Bill, which concerns positive action, provides that the Bill does not prohibit the use of positive action measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce their under-representation in relation to particular activities, and meet their particular needs. It will, for example, allow measures to be targeted to particular groups, including training to enable them to gain employment, or health services to address their needs. Any such measures must be a proportionate way of achieving the relevant aim.*
>
> *The extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or under-representation and the availability of other means of countering them.* ***This provision will need to be interpreted in accordance with European law which limits the extent to which the kind of action it permits will be allowed."*** [bolded for emphasis]

So, whilst it is true that the Equality Act is a consolidating statute that enacts group- based protections against discrimination on the grounds of sex and gender reassignment and imposes duties of positive action, these provisions are not derived from UK law but instead flow from EU law and the provisions of the **Gender Directive.** Therefore, the Supreme Court should have interpreted the duties of positive action and the provisions relating to sex discrimination and gender reassignment in light of the provisions of the **Gender Directive.** There is no mention of the Gender Directive in the judgment.

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8) **Premise 8: It is important that the EA 2010 is interpreted in a clear and consistent way so that groups which share a protected characteristic can be identified by those on whom the Act imposes obligations so that they can perform those obligations in a practical way (paras 151-154 of the judgment).**

The Equality Act 2010, in giving effect to the **Gender Directive** and CJEU caselaw like the case of ***P v S and Cornwall County Council*** [1996][93], has interpreted the Equality Act in a gender inclusive way for the last thirty years without any great difficulty and the courts have to have regard to Parliament's intention when interpreting statutes.

Parliament's intention, when implementing the **Gender Directive** into the Equality Act was to give a certificated sex reading of sex, not a biological reading of sex. That was done to give effect to the CJEU judgment in ***P v S and Cornwall County Council*** [1996][94] along with the provisions of the **Gender Directive**. A certificated sex reading has been the default since 1996 and the Equality Act has been interpreted and enacted using this clear and consistent definition from the beginning. Therefore, if the UKSC was going to insist on a single interpretation, it should have singled out the pregnancy provisions as being unworkable as opposed to precluding the certificated sex interpretation as being the default one where possible.

[93] N [15]
[94] N [15]
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9) **Premise 9: There is no indication in relevant secondary materials that the EA 2010 modified in any material way the meaning of "man" and "woman" or "sex" from the meanings in the SDA 1975 (para 164).**

This is clearly incorrect. The **Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain**, the two Command Papers published by the Government Equalities Office: **Framework for a Fairer Future – the Equality Bill** (Cm 7431); and **The Equality Bill – Government Response to the Consultation** (Cm 7454) and the **Explanatory notes to the Equality Bill** clearly constitute relevant secondary materials that show beyond doubt that the Equality Act 2010 modified in material ways the meaning of "man", "woman" and "sex" found in the Sex Discrimination Act 1975 by giving effect to the Gender Directive through the Sex Discrimination (Amendment of Legislation) Regulations 2008, and then rolled these amendments to the SDA 1975 into the Equality Act 2010. The provisions of the **Recast Equal Treatment Directive** were also incorporated into the Equality Act 2010.

The UKSC interpretation appears to be based on an incomplete understanding of the background to the Equality Act. There are, and they have been cited here, several highly relevant secondary materials that show that the Equality Act 2010 modified in any material way the meaning of "man" and "woman" or "sex" from the meanings in the SDA 1975, particularly the **Discrimination Law Review** and **the Equality Bill – The Government response to the Consultation,** which was published in 2007. These show beyond doubt that the Sex Discrimination Act was amended by the **Gender Directive** and that the language of the Equality Act and the definitions of sex found in the Equality Act were drawn from the language of the Gender Directive, which was trans inclusive.

The **Gender Directive,** read in light of the judgment in ***P v S and Cornwall County Council*** [1996][95], explicitly moved away from a definition of sex that used the terms "man" and "woman" and instead moved to gender-neutral terms of "one sex" or the other sex, thereby defining sex in a way that was inclusive of certificated sex. Parliament, when drafting the Equality Act, applied the CJEU's reasoning in ***P v S and Cornwall County Council*** [1996][96], and construed discrimination on the grounds of gender reassignment as discrimination on the grounds of sex. Therefore, Parliament's intention was to give a certificated sex reading to the Equality Act, and the courts do not have the right to over-ride Parliament in this way. What is clear from these secondary materials is that the Equality Act was drafted with the provisions of the **Gender Directive** and the case of ***P v S and Cornwall County Council*** [1996][97] in mind, and with the intention to give effect to both.

[95] N [15]
[96] N [15]
[97] N [15]
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10) **Premise 10: "Interpreting "sex" as certificated sex would cut across the definitions of "man" and "woman" and thus the protected characteristic of sex in an incoherent way. (paras 172, 177-188 of the judgment).**

Parliament's intention when legislating for the Equality Act 2010 was to amend the definition of indirect discrimination from the one used in the SDA 1975, which talks of "men" and "women", to the gender-neutral provision found in the **Gender Directive,** which does not mention men and women at all. Therefore, Parliament's intention when drafting the Equality Act was to cut across the definitions of "man" and "woman" found in the Sex Discrimination Act, and give effect to the gender-neutral, certificated sex reading found in the **Gender Directive.** This is not incoherent – it gives effect to EU law and a certificated sex reading has applied in the UK for the last 15 years without being a problem. Article 2(b) of the **Gender Directive,** defines indirect discrimination as:

> *"where an apparently neutral provision, criterion or practice would put persons of **one sex** at a particular disadvantage compared with persons of **the other sex**, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary".*

Therefore, when the Equality Act was being drafted, and the provisions of the **Gender Directive** were being given effect in UK law, Parliament had in mind the ruling in ***P v S and Cornwall County Council*** [1996][98], which held that discrimination on the grounds of gender reassignment forms part of sex discrimination. Therefore, from the outset, Parliament was applying a certificated sex reading to the Equality Act, and they fully intended to cut across the definitions of "man" and "woman" found in the Sex Discrimination Act, as those provisions did not comply with the **Gender Directive.**

[98] N [15]

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11) **Premise 11 - We reject the suggestion of the Inner House[99] that the words can bear a variable meaning so that in the provisions relating to pregnancy and maternity the EA 2010 is referring to biological sex only, while elsewhere it refers to certificated sex as well (paras 189-197).**

In a consolidating statute, like the Equality Act, it is perfectly possible for words to bear a variable meaning, as the statute is bringing together a range of provisions. Furthermore, as we saw in relation to the question of statutory interpretation, the obligation on the English courts to construe domestic legislation consistently with EU law is not, in particular:

(a) constrained by conventional rules of construction.

(b) does not require ambiguity in the legislative language.

(c) is not an exercise in semantics or linguistics.

(d) permits departure from the strict and literal application of the words which the legislature has elected to use.

(e) permits the implication of words necessary to comply with EU law obligations, and

(f) the precise form of the words to be implied does not matter."

So, as a matter of EU law and the interpretation of EU law, words are perfectly able to bear a variable meaning.

The **Discrimination Law Review** also covers the question whether the provisions in the Equality Act that relate to pregnancy and maternity relate to biological sex only.. It says:

"*Discrimination on grounds of pregnancy and maternity*

B.29 The Gender Directive stipulates that less favourable treatment on grounds of pregnancy or maternity in goods and services is direct sex discrimination.

B.30 The Sex Discrimination Act explicitly provides that less favourable treatment on grounds of pregnancy or maternity leave is unlawful in relation to employment, but there is nothing on the face of the Sex Discrimination Act making similar provision in respect of goods, facilities or services and premises.

B.31 To ensure clarity and consistency of the law, we intend to make explicit that less favourable treatment on grounds of pregnancy and maternity in the provision of goods, facilities or services and premises is direct sex discrimination.

[99] The Inner House of the Court of Session is the senior part of the Court of Session, the supreme civil court in Scotland.

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Defining 'maternity'

B.32 There are no precedents for a definition of 'maternity' in discrimination law concerning provision of goods, facilities or services and premises. When considering how maternity should be defined, we noted that:

- *the definition used in the Sex Discrimination Act in the context of employment relates to 'maternity leave'; and*
- *The Sex Discrimination Act also contains a provision for special treatment of women in connection with 'pregnancy and childbirth' (section 2(2) Sex Discrimination Act). This applies to both employment and other fields, including goods, facilities or services and premises. This means that it is not discriminatory to afford women special treatment in connection with pregnancy and childbirth.*

B.33 Options for defining maternity for the purpose of the Sex Discrimination Act provisions cove ring goods, facilities or services and premises therefore include:

- *Defining maternity as 'childbirth'.*
- *Defining maternity according to the age of the child – for example, protecting mothers of babies aged up to one year.*
- *Providing protection for 'mothers of young children'.*
- *Not defining maternity.*

The draft regulations which we have prepared for consultation define maternity for the purposes of the goods, facilities or services and premises provisions as one year (52 weeks) after the birth of the child. We consider that this would add clarity and certainty about rights and responsibilities."

The **Gender Directive** gives effect to the sex discrimination/gender reassignment provisions and also covers pregnancy and maternity. Given that transgender men can become pregnant, and would therefore be covered by the **Gender Directive,** it would appear that by default, the provisions of the **Gender Directive** were intended to have a certificated sex reading. The **Gender Directive** covers the provisions outside of employment that relate to sex discrimination, gender reassignment, pregnancy and maternity. The Supreme Court should have considered this context, and the relevant provisions of the Gender Directive should have led the Supreme Court to come to a conforming interpretation of the Equality Act. When interpreting EU law, it is perfectly possible to have words with a variable meaning, so long as the protections derived from EU law are given effect.

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12) **Premise 12 "Gender reassignment and sex are separate bases for discrimination and inequality" (paras 198-203 of the judgment).**

Discrimination on the grounds of gender reassignment has consistently been held to be discrimination on the grounds of sex, by the CJEU.[100] This is settled EU law. Sex discrimination and gender reassignment haven't been separate bases for discrimination since 1996, when the case of ***P v S and Cornwall County Council*** [1996][101] was decided.

Since the Equality Act was introduced, gender reassignment and sex discrimination have always been inextricably connected, because that is the approach that is reflected in the **Gender Directive** and CJEU caselaw.

This premise runs completely contrary to EU law and particularly the CJEU case law described above. EU law considers it settled law that discrimination on the grounds of gender reassignment **is** discrimination on the grounds of sex.

[100] See cases C-13/94 *P v S and Cornwall County Council* [1996] 2 C.M.L.R. 247, C-117/01 - *K.B v National Health Service Pensions Agency* [2004] ECR 2004 1-541, C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR 1-3602 and C-451/16 *MB v Secretary of State for Work and Pensions* [2018] ECLI:EU:C:2018:492

[101] N [15]

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13) **Premise 13 A certificated reading of 'sex' in the Equality Act] would also seriously weaken the protections given to those with the protected characteristic of sexual orientation for example by interfering with their ability to have lesbian-only spaces and associations (paras 204-209).**

This objection to a certificated sex reading of the Equality Act 2010 doesn't necessarily follow. Directive 2000/78 was the directive that prohibited discrimination on the grounds of sexual orientation. This directive sets out a general framework to ensure equal treatment of individuals in the European Union (EU) at the workplace regardless of their religion or belief, disability, age or sexual orientation.

It covers both direct discrimination (differential treatment based on a specific characteristic) and indirect discrimination (any provision, criterion or practice which is apparently neutral but puts the people in the above categories at a disadvantage compared to others). Harassment, which creates a hostile environment, is deemed to be discrimination.

The provisions of the directive were enacted into UK law, by the Employment Equality (Sexual Orientation) Regulations 2003 SI n° 1661 of 26/06/2003 and these provisions were then repealed when the Equality Act 2010 came into force, as the provisions of this directive were enacted into the Equality Act.

The Directive provides that:

> *"The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons."*

The **Explanatory notes to the Equality Bill** demonstrate that the Equality Act recognises that those with a protected characteristic, such as sexual orientation, are entitled to have their own lesbian only spaces and associations. Applying a certificated sex reading to the Equality Act, in line with the **Gender Directive**, does not change that. The Explanatory notes say[102]:

> *"The balance which has been struck between competing rights throughout the Bill is also demonstrated by clause 101 and the exception to it at Schedule 16, which are designed to balance the Article 8 and 11 freedoms of individuals (and associations) to determine their associates (and members) against the Article 8 and 11 (read with 14) freedoms of individuals to associate without discrimination. Where there is such a conflict between competing interests, States must find a fair and proper balance. The Government has concluded that imposing a general prohibition on discrimination in this area but*

[102] At paragraph 38 on page 14 of the Explanatory notes.

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allowing single characteristic clubs to continue strikes the correct balance. It ensures that although the ability of a person to become a member of a club should not, in general, be dependent on particular protected characteristics, individuals and associations may still choose to associate with or limit their membership to those who share a particular protected characteristic. The availability of other clubs ensures that the restriction on Article 11 rights, as prescribed by law, is proportionate to the legitimate aim of protecting the Article 11 rights of others who would wish to join single characteristic clubs. Moreover, the Government concludes that there is no violation of Article 14 because any difference in treatment is proportionate to the legitimate aim of protecting the rights and freedoms of others."

Therefore, it does not follow that a certificated reading of 'sex' in the Equality Act would seriously weaken the protections given to those with the protected characteristic of sexual orientation for example by interfering with their ability to have lesbian-only spaces and associations, as from the outset the Equality Act sought to balance the freedom of individuals to determine their associates and members, against the freedom of individuals to associate without discrimination. Individuals and associations may still choose to associate with or limit their membership to those who share a particular protected characteristic. The availability of other clubs ensures that the restriction on Article 11 rights, as prescribed by law, is proportionate to the legitimate aim of protecting the Article 11 rights of others who would wish to join single characteristic clubs. Moreover, the Government concludes that there is no violation of Article 14 because any difference in treatment is proportionate to the legitimate aim of protecting the rights and freedoms of others.

Premises 14 and 15 will be taken together as they both cover single sex facilities.

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14) **Premise 14 There are other provisions whose proper functioning requires a biological interpretation of "sex". These include separate spaces and single-sex services (including changing rooms, hostels and medical services), communal accommodation and others (paras 210-228).**

15) **Premise 15 Similar incoherence and impracticability arise in the operations of provisions relating to single-sex characteristic associations and charities, women's fair participation in sport, the operation of the public sector equality duty, and the armed forces (paras 229-246).**

There is no need to give the term "sex" in the Equality Act a biological sex reading, as the **Gender Directive** already provides that differences in treatment may be accepted but only if they are justified by a legitimate aim. Article 4(5) of the **Gender Directive** states:

> *"This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."*

This is expanded upon in Recital (16) of the **Gender Directive**, which says:

> *"Differences in treatment may be accepted only if they are justified by a legitimate aim. A legitimate aim may, for example, be the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events). Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities."*

Therefore, the wording that "differences in treatment may be accepted only if they are justified by a legitimate aim" is language that is drawn from EU law. Therefore, any dilution of this standard would constitute a breach of Directive 2004/113 (the **Gender Directive**) which is subject to a non-regression clause in the Northern Ireland Protocol.

The document "The Equality Bill – Government Response to the consultation"[2008] (CM 7454) at page 189, explains the difference in approach between the exclusions found in the Sex Discrimination Act and the approach taken to differences in treatment under the **Gender Directive.** It explains that:

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"16.6 The Sex Discrimination Act includes a small number of exceptions that allow facilities or services to be provided on a single-sex basis, e.g. for reasons of privacy and decency.

The Directive permits different treatment of women and men in two respects. Firstly, where there is a legitimate aim and the different treatment is a proportionate means of achieving that aim. And secondly, where the different treatment has the aim of preventing or compensating for disadvantages linked to sex, i.e. positive action.

The consultation paper sought views on proposals to bring the pre-existing exceptions in the Sex Discrimination Act into line with the Gender Directive. These exceptions range through services provided for men or women only for reasons of decency to facilities or services restricted to one sex in a place occupied or used by an organised religion and the restriction is made in order to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of its followers.

16.11 Where the exceptions as they existed in the Sex Discrimination Act before 6 April 2008 ran the risk of not complying fully with the Directive, the Regulations have tightened the drafting so that the differential treatment of men and women that the exceptions permit is compatible with European law.

16.12 The Regulations have also amended the specific exceptions in the Sex Discrimination Act that allow provision to women or to men only, other than in relation to the excluded matters, to allow for different treatment of transsexual people on the ground of gender reassignment, but only where such treatment is a proportionate means of achieving a legitimate aim, or in respect of voluntary bodies and charities, as positive action measures."

So, there is no doubt that the **Gender Directive** amended the definition of sex found in the Sex Discrimination Act away from the term's "men" and "women", to bring the definition of sex in line with the **Gender Directive.**

What constitutes a legitimate aim?

The **Discrimination Law Review** (page 40) explores what is meant by a legitimate aim in more detail.

Legitimate aims and proportionate means

1.42 The European Directives use the formula that the provision, criterion or practice must be "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". British law uses the wording "which he cannot show to be a proportionate means of achieving a legitimate aim". "Proportionate" has the same effect as "appropriate and necessary".

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1.43 A wide variety of aims may be considered legitimate, but they must correspond with a real need on the part of the employer or service provider. Economic factors such as business needs and efficiency may be legitimate aims but arguing that it could be more expensive not to discriminate may not in itself be a valid justification

The legitimate aim cannot itself be discriminatory.

1.44 What is proportionate will depend on the facts of each case. Generally, the provision, criterion or practice must be appropriate with a view to achieving the objectives pursued. The need for it must outweigh the disproportionate impact it has on people of a protected group. Consideration may be given to whether the legitimate aim can be achieved by other means which have fewer or no discriminatory effects. "

The **Discrimination Law Review** at page 179 explores this further. It says:

"B.16 Article 4(5) of the Gender Directive permits differences in treatment between men and women if the provision of goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

B.17 The Government negotiated this provision to ensure that we could retain certain specific exceptions in the Sex Discrimination Act such as the provision of accommodation by a person in a part of their home for reasons of privacy and decency, single-sex voluntary bodies to promote the interests of men or women, membership of single-sex clubs to allow freedom of association, and the organisation of single-sex sports events.

B.18 We have reviewed the existing exceptions in the Sex Discrimination Act which allow for difference of treatment, to assess whether each one is compatible with the Directive or whether any changes are necessary.

There are many which we consider already meet the test set out in the Directive or do not fall within its scope. However, there are some where we consider specific changes are needed to ensure any differences of treatment are justified.

The key points here are:

1. that under the Directive, treating people who are trans differently can only be justified by a legitimate aim and
2. In a personal context, this requirement flows from EU law, specifically the **Gender Directive**. Different Directives deal with discrimination in a work context, although similar principles apply in all of them.
3. Wanting to exclude people for discriminatory reasons is not a legitimate aim.

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4. Any limitation has to be shown to be appropriate and necessary, in conformity with the **Gender Directive** and in accordance with the criteria derived from CJEU caselaw. Any attempt to ban trans people from spaces can only be justified if it complies with the **Gender Directive** and the criteria derived from retained CJEU caselaw. This means that any limitations on the rights of people who are trans to access services must comply with the principles found in the CJEU cases of ***P v S and Cornwall County Council***[103], ***Richards v Secretary of State for Work and Pensions***[104] and ***MB v Secretary of State for Work and Pensions***[105].

Annex B of the Discrimination Law Review [2007] gives further guidance on when trans people can be excluded from spaces. It specifies that:

> ***"Gender reassignment: discrimination against transsexual people in the provision of goods, facilities or services and premises***
>
> *B.1 We have made clear that we consider discrimination against transsexual people is unacceptable. European case law[106] has held that the right not to be discriminated against on grounds of a person's sex includes discrimination on the grounds of the gender reassignment of a person.*
>
> *We therefore consider that the Gender Directive provides protection for people who intend to undergo, are undergoing or have undergone gender reassignment against discrimination in the provision of goods, facilities or services and premises.*
>
> *B.2 We propose to make direct discrimination and harassment on grounds of a person's gender reassignment unlawful in the fields of goods, facilities or services and premises, as it already is in the fields of employment and vocational training. Proposals concerning indirect discrimination on the grounds of a person's gender reassignment are not addressed here but are dealt with as part of the proposals for a Single Equality Bill (see Chapter 1).*
>
> ***Single-sex services - exceptions to the prohibition of discrimination on grounds of a person's gender reassignment***
>
> *B.3 As highlighted above, the Sex Discrimination Act contains a number of exceptions from the general prohibition on sex discrimination in goods, facilities or services and premises. The Gender Directive also allows for different*

[103] N [15]
[104] N [17]
[105] N [18]
[106] C-13/94 *P v S and Cornwall County Council [1996] 2 C.M.L.R. 247*
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treatment if the provision of goods and services exclusively or primarily to members of one sex is justified. Most transsexual people wish to be treated in their acquired gender. Nevertheless, we consider it is appropriate in policy terms and necessary for reasons of clarity, for the law to allow, in certain limited circumstances, single-sex service providers (such as voluntary or charitable organisations set up for the benefit of one sex only) to treat a transsexual person differently from other men or women. Those limited circumstances are where the single- sex service provider can demonstrate that their different treatment of a transsexual person in a particular case was a proportionate means of achieving a legitimate aim, in accordance with Article 4(5) of the Directive.

The reason for this limited exception is that we recognise that there may be some cases where it may not always be clear to a single-sex service provider whether their services can be made available to a transsexual person. This may occur, for example, where someone is in the middle of the process of gender reassignment or has undergone the process but does not present in their acquired gender and it is unclear whether the particular single-sex service can be provided to the transsexual person in accordance with their birth sex or their acquired sex. Much will depend on the particular circumstances of each case. To rely on such an exception, single-sex service providers will need to be able to point to a legitimate aim and demonstrate, in the circumstances of the particular case, why no less discriminatory alternatives of achieving that legitimate aim were available.

Relevant factors which may need to be taken into account include the particular service being provided or the facilities available; the views of the transsexual person; the stage of transition of the transsexual person when they seek access to the service; and the impact on other users of the service.

We propose to provide guidance on the factors which may need to be taken into account when a decision is made to treat a transsexual person differently from other men or women in the provision of single-sex services.

Sport

B.1 We intend to clarify in the Sex Discrimination Act that in single-sex sporting competitions, it will be lawful to discriminate on grounds of a person's gender reassignment where this is necessary to secure fair competition or the safety of competitors, but not otherwise.

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Table 1 found in **Annex B** of the Discrimination Law Review sets out the then Labour Governments intentions regarding single sex spaces at the time the Equality Act was being drafted. Table 1 lists all of the exceptions in the Sex Discrimination Act which applied in the context of the Directive and sets out where the Labour government of the day consider changes were needed in order to bring equality law in line with the provisions of the **Gender Directive**. However, when seeking to rely on these provisions, organisations should also have regard to the relevant factors described above, namely:

(i) the particular service being provided or the facilities available.

(ii) the views of the trans person.

(iii) the stage of transition of the trans person when they seek access to the service; and

(iv) the impact on other users of the service.

(v) The legitimate aim cannot itself be discriminatory.

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16) **Premise 16: It is striking that the EHRC has advised the UK Government of the problems created by its interpretation of the EA 2010, which include many of the matters which we have discussed above and has called for legislation to amend the Act. The absence of coherence and the practical problems to which that interpretation gives rise are clear pointers that the interpretation is not correct (para 247).**

A detailed reading of the history of the Equality Act and its EU law origins/associations makes clear that the Equality and Human Rights Commission interpretation of the Equality Act is highly selective, as demonstrated, and consequently should not form the basis for the government interpretation of the Equality Act 2010.

The EHRC, under Baroness Falkner has been repeatedly criticised for its policies and attitudes towards trans people. The EHRC was subject to a special review by the UN, following complaints by 30 LGBT organisation regarding Baroness Falkner's preferred definition of sex as referring to biological sex.[107] **UN experts have warned of legal uncertainty and rights implications following UK Supreme Court ruling.** Various legal proceedings have also been issued against the EHRC, relating to their attempts to exclude trans people following the ruling.

It is also worth noting that equality bodies and organisations generally are subject, under both the **Gender Directive** and the Equality Act, to not instruct others to commit direct or indirect discrimination on the grounds of sex, as this is deemed to be discrimination under s4(4) of the **Gender Directive** and is also prohibited under s111 of the Equality Act.

[107] See **https://www.bbc.co.uk/news/articles/ck7p88zx2z2o** for further details.

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17) **Premise 17: The interpretation of the EA 2010 (ie the biological sex reading), which we conclude is the only correct one, does not cause disadvantage to trans people, with or without a GRC. In the light of case law interpreting the relevant provisions, they would be able to invoke the provisions on direct discrimination and harassment, and indirect discrimination. A certificated sex reading is not required to give them those protections (paras 248-263).**

Actions and attempts to exclude trans people from public life since the ruling, have demonstrated this to be untrue in reality. Furthermore, the "biological sex" ruling has been heavily criticised for its lack of workability in practice. For example, the union branch of the BMA, that represents approximately 50,000 doctors issued a statement saying that it "*condemns scientifically illiterate rulings from the Supreme Court, made without consulting relevant experts and stakeholders, that will cause real-world harm to the trans, non-binary and intersex communities in this country".*

The full text of the motion reads:

> *"This meeting condemns the Supreme Court ruling defining the term 'woman' with respect to the Equality Act as being based on 'biological sex', which they refer to as a person who 'was at birth of the female sex', as reductive, trans and intersex-exclusionary and biologically nonsensical.*
>
> *"We recognize as doctors that sex and gender are complex and multifaceted aspects of the human condition and attempting to impose a rigid binary has no basis in science or medicine while being actively harmful to transgender and gender diverse people. As such this meeting:*
>
> *"i: Reiterates the BMA's position on affirming the rights of transgender and non-binary individuals to live their lives with dignity, having their identity respected.*
>
> *"ii. Reminds the Supreme Court of the existence of intersex people and reaffirms their right to exist in the gender identity that matches their sense of self, regardless of whether this matches any identity assigned to them at birth."*

Many legal commentators have also criticised the Supreme Court judgment for not recognising the risks inherent with the biological straitjacket that the judgment in FWS has wrought. For example, Robert Mullins published an article on the UK Constitutional Law Association called "**For Women Scotland – fastening the biological straitjacket**", which referred to the problems of practically applying the judgment in *FWS* to people who are intersex. This point, the fact that the judgment in *FWS* creates a hierarchy of protections rather than protecting everyone with protected characteristics equally and the likely incompatibility of the decision in *FWS* with Convention rights was also highlight by Robin Allen KC, a leading expert in equality law, in his article for the Discrimination Law Association 'Briefings', "*Self-determination and the limits to segregation: another perspective on For Women Scotland"*. Concerns have also been raised about the Supreme Court's failure to

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engage with Convention rights before reaching its judgment by several other commentators.[108]

There have been some legal commentators that have supported the ruling. Ben Cooper KC, who represented Sex Matters in the case of *FWS* at the Supreme Court has recently published a paper called "For Women Scotland v The Scottish Ministers: Why the Supreme Court's judgment does not remove, diminish or breach the rights and protections of trans people". Michael Foran, who was a Consultant to Sex Matters in relation to their intervention before the Supreme Court in For Women Scotland has written a paper called "Is legal recognition of biological sex a violation of human rights?'[109], where he argued that no, it wasn't. Karon Monaghan KC, who represented Scottish Lesbians; The Lesbian Project; and the LGB Alliance in the case of *FWS* at the Supreme Court, has published a paper in the July 2025 edition of the Discrimination Law Association 'Briefings", called "Why the Supreme Court in For Women Scotland was right". However, none of these papers consider any of the background materials to the Equality Act, the EU origins of the Equality Act, the Gender Directive, the Recast Equal Treatment Directive and anything other than a brief mention of the case of *P v S and Cornwall County Council* [1996][110].

The decision is *FWS* has also damaged the UK's reputation internationally. The Council of Europe Commissioner for Human Rights has heavily criticised the Supreme Court ruling, saying:

> *"The Commissioner is concerned about the current climate for trans people. Although they constitute a very small proportion of the population, and face acute marginalisation across all areas of life, trans people have been subject to intense political and public debate and scrutiny, including in the wake of the Supreme Court's judgment in* For Women Scotland Ltd. v. The Scottish Ministers*. He observes a tendency to see the human rights of different groups as a zero-sum game, when in reality any tensions will likely be exceptional; nuanced, reasonable and balanced accommodations can be found. He deplores that discussions tend towards the exclusion of trans people from many aspects of society, rather than ensuring that their inclusion and dignity are upheld. The Commissioner reiterates that all relevant legal or policy developments must be human rights-compliant, including in view of the case law of the European Court of Human Rights and other international instruments."*

Furthermore, insofar as the FWS interpretation of the Equality Act 2010 conflicts with EU law, Northern Ireland is obligated by the UK Parliament to ignore the judgment, and therefore the judgment by the Supreme Court in FWS has also impacted the constitutional integrity in the UK. It would have made far more sense for the Supreme Court to come to a decision that not only reflected the EU law origins of the Equality Act but also gave effect to EU law during the transition period, as doing so would have meant that the judgment could safely be applied in all the constituent parts of the UK. As things stand, the decision in FWS does not apply in Northern Ireland as it would conflict with EU law. This point was made in the article **"Limits to the UK**

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[108] See for example Crash Wigley: **For Women Scotland: A Case of Significant Silences** and Jess O'Thomson and Oscar Davies article "A third sex: returning to an intermediate zone" available from Discrimination Law Briefings, July 2025 p14.
[109] M. Foran 'For Women Scotland: Is legal recognition of biological sex a violation of human rights?', U.K. Const. L. Blog (15th May 2025)
[110] N [15]
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Supreme Court's Reach: Northern Ireland, the Windsor Framework and Trans Rights"[111]. The article makes the point that:

> *"There is thus no reason to believe that FWS should have any impact in Northern Ireland at all, and pressure to give effect to the UKSC position should be resisted, on the straightforward basis that giving effect to it would be unlawful. Trans people are as a matter of EU law considered to hold the sex that they acquired, rather than the sex they were assigned to birth – and that a failure to consider trans individuals as holding their acquired sex is a breach of EU law – both primary and secondary – which falls within the scope of the Windsor Framework."*

In light of all of these problems and difficulties, the idea that the Supreme Court interpreting the Equality Act 2010 using a biological sex reading, was not going to cause any problems to trans people or more generally seems unduly optimistic. Events since the ruling was issued have demonstrated that to be false.

The judgment has not "clarified" anything. Instead, it has generated a huge amount of legal uncertainty because the Supreme Court have ruled in a way that disapplies long standing rights that trans people have had for years under EU law, and even worse, does so retrospectively.

With this judgment, the Supreme Court has not interpreted the law; instead, it has ruled in a way that is contrary to Parliament's intention at the time the Equality Act was being drafted and contrary to EU law and key provisions of the EU-UK Withdrawal Agreement.

[111] See the Administrative Law Blog, "Limits to the UK Supreme Court's Reach: Northern Ireland, the Windsor Framework and Trans Rights", https://administrativecourtblog.wordpress.com/2025/04/30/limits-to-the-uk-supreme-courts-reach-northern-ireland-the-windsor-framework-and-trans-rights/

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Conclusion

We have shown in this paper that the judgment in *FWS* is based on an incorrect understanding of the background to the Equality Act. There were several in-depth background documents published by the Labour government of the day that explained the background to the Equality Act. The historical background to the Equality Act 2010 is that the provisions of the Sex Discrimination Act 1975, which defined sex using the terms "man" and "woman" was amended to give effect to the **Gender Directive.** The **Gender Directive** applies the gender-neutral definitions of sex in the directive; they do not refer to men and women at all.

The intention was to incorporate the provisions of the **Gender Directive** into the Equality Act, but the Government were aware that the Equality Act would not become law by the 21 December 2007. Therefore, the Sex Discrimination Act 1975 was amended by the Sex Discrimination (Amendment of Legislation) Regulations 2008, and then when the Equality Act 2010 became law, the Sex Discrimination (Amendment of Legislation) Regulations 2008 were repealed in their entirety, by Part 2 of Schedule 27 of the Equality Act 2010. Once the Equality Act became law the Sex Discrimination Act 1975 was then repealed, and so it hasn't been in force since 2010. The Sex Discrimination Act 1975 is irrelevant when it comes to interpreting the Equality Act as the language of the Sex Discrimination Act, which talks of men and women, was not carried forward into the Equality Act. Instead, the term "sex" in the Equality Act was given a certificated sex reading of the term, in order to give effect to both the **Gender Directive** and CJEU caselaw, like the case of ***P v S and Cornwall County Council*** [1996][112].

What the background documents to the Equality Act 2010 do make clear is that while the **Gender Directive** does not explicitly mention gender reassignment, the CJEU ruled in the case of ***P v S and Cornwall County Council*** [1996][113] and subsequent caselaw relating to sex discrimination and gender reassignment, that the right not to be discriminated against on grounds of sex includes discrimination arising from a person's gender reassignment. According to the CJEU, this is settled law. Therefore, the Labour government were required to outlaw discrimination against trans people in the provision of goods and services which fall within the Directive's scope. Sex discrimination and discrimination on the grounds of gender reassignment have always been intertwined as concepts – they are not separate grounds of discrimination, and the Equality Act was drafted to give effect to a certificated sex reading of its provisions.

Therefore, the Sex Discrimination Act 1975 is irrelevant when it comes to interpreting the Equality Act 2010. The Supreme Court should have interpreted the Equality Act in light of the **Gender Directive** not the Sex Discrimination Act 1975, as the **Gender Directive** amended the Sex Discrimination Act as part of the process of enacting the Equality Act 2010. The language of the Equality Act, specifically the definition of sex, is not derived from the Sex Discrimination Act – it is derived from the **Gender Directive**. The Sex Discrimination Act 1975 is irrelevant when it comes to interpreting the Equality Act 2010, as the SDA was amended by the

[112] N [15]
[113] N [15]
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Gender Directive, interpreted in accordance with the case of ***P v S and Cornwall County Council*** (Case 13/94) [1996] 2 C.M.L.R. 247 and subsequent CJEU caselaw on sex discrimination and gender reassignment. The factual matrix of the ruling in *FWS* is therefore based on fatal errors of fact and has been wrongly decided as a result.

This CJEU caselaw, taken with the provisions of the **Gender Directive,** should have led the Supreme Court to come to a conforming interpretation of the Equality Act, which was in accordance with EU law. The Supreme Court also misapplied the rules of statutory interpretation in this case.

Furthermore, the ruling in *FWS* by the Supreme Court has potentially put the UK in breach of Article 127(1)(3) and Article 4 of the EU-UK Withdrawal Agreement., under Lord Lloyd Jones analysis in ***Lipton*** of how higher courts should decide cases that start in the transition period but only get decided after Brexit. These principles arguably should have been applied to the case of FWS. The Withdrawal Agreement is also likely to be of relevance if it is applied in Northern Ireland as the Northern Ireland protocol/Windsor framework is subject to a non-regression in relation to all of the Equal Treatment Directives, including the **Gender Directive.**

Even if one applies the alternative analysis of how the Supreme Court should approach cases that started during the transition period but were only decided after Brexit, where the Supreme Court can depart from previous CJEU caselaw "when it feels it is right to do so", the Supreme Court did not decide in the case of *FWS* that the decisions in ***P v S and Cornwall County Council*** [1996][114], ***Richards v Secretary of State for Work and Pensions*** [2006][115], and ***MB v Secretary of State for Work and Pensions*** [2018][116] were wrongly decided by the CJEU. Nor was it argued by Sex Matters that those cases were wrongly decided. Therefore, under the common law rules which govern when a higher court can depart from CJEU caselaw, it was not justifiable for the Supreme Court to depart from CJEU caselaw when deciding the case of *FWS*.

Under either analysis, the UK Supreme Court should have followed and applied the decisions in the CJEU cases described above and also interpreted the Equality Act in conformity with EU law, and specifically the provisions of the **Gender Directive** and the **Recast Equal Treatment Directive.** There is no excuse for the fact that they did not do so, given that the Equality Act is a rights-enhancing piece of legislation the majority of which is required to implement the UK's obligations under EU law.

The decision in FWS is based on significant errors of fact and law and also potentially puts the UK in breach of its obligations under the Withdrawal Agreement. It gives every indication of being wrongly decided and should not, in our view, be relied upon by organisations as justification for excluding trans people from public life.

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[114] N [15]
[115] N [17]
[116] N [18]

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